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A
SELECTION OF CASES
ON THE
LAW OF CONTRACTS

BY
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IN COLUMBIA UNIVERSITY

IN TWO VOLUMES
VOL. I

NEW YORK
BAKER, VOORHIS & COMPANY

1898

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NOTE.

THE attempt has been made in this compilation to furnish the student with a collection of cases developing the fundamental principles involved in the formation, performance, and discharge of simple contracts and contracts under seal.

As the collection has been prepared primarily with reference to the needs of the students in the School of Law of Columbia University, cases relating to the statute of frauds, the statute of limitations, and the jurisdiction of equity over contracts have been omitted without regard to the question of classification, these topics being adequately treated in that School in other courses.

W. A. K.

NEW YORK, September 1, 1898.

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CASES ON CONTRACTS.

PART I.

FORMATION OF CONTRACTS.

CHAPTER I.

SIMPLE CONTRACTS.

SECTION I.—OFFER AND ACCEPTANCE.

(a) *Necessity of intention to create a legal obligation.*

JACOB F. KELLER *v.* JACOB HOLDERMAN.

IN THE SUPREME COURT OF MICHIGAN, MAY 12, 1863.

[*Reported in 11 Michigan Reports 248.*]

ERROR to Berrien Circuit.

Action by Holderman against Keller upon a check for \$300,¹ drawn by Keller upon a banker at Niles, and not honored. The cause was tried without a jury, and the Circuit Judge found as facts, that the check was given for an old silver watch, worth about \$15, which Keller took and kept till the day of trial, when he offered to return it to the plaintiff, who refused to receive it. The whole transaction was a frolic and banter—the plaintiff not expecting to sell, nor the defendant intending to buy the watch at the sum for which the check was drawn. The defendant when he drew the check had no money in the banker's hands, and had intended to insert a condition in the check that would prevent his being liable upon it ; but as he had failed to do so,

¹ Although not an action upon a simple contract, the case is printed in this collection, as no question of negotiable paper was involved in the decision.—ED.

and had retained the watch, the Judge held him liable, and judgment was rendered against him for the amount of the check.

W. A. Moore for plaintiff in error.

James Brown for defendant in error.

MARTIN, Ch.J.: When the Court below found as a fact that "the whole transaction between the parties was a *frolic and a banter*, the plaintiff not expecting to sell, nor the defendant intending to buy the watch at the sum for which the check was drawn," the conclusion should have been that no contract was ever made by the parties, and the finding should have been that no cause of action existed upon the check to the plaintiff.

The judgment is reversed, with costs of this Court and of the Court below.¹

The other Justices concurred.

¹ Mere words without any intention corresponding to them, will not make a marriage or any other civil contract. But the words are the evidence of such intention, and if once exchanged, it must be clearly shown that both parties intended and understood that they were not to have effect. In this case the evidence is clear that no marriage was intended by either party; that it was a mere jest got up in the exuberance of spirits to amuse the company and themselves. If this is so, there was no marriage. On this part of the case I have no difficulty.—Zabriskie, C., *McClurg v. Terry*, 21 N. J. Eq. 225, 227.

The offer of the defendant, upon which the plaintiff relies, was to give the plaintiff \$40 for the cow if he would deliver her to the defendant in as good condition as she was in when Sleeper bought her. . . . The defendant and Sleeper were in litigation about the cow, and the plaintiff was in the employment of Sleeper at the time when the parties met. Their conversation commenced in the way of bantering between them about the importance of that litigation, and not in the way of making a trade in the usual course of business. From the testimony referred to, it appears that some of the witnesses, who were there and heard the conversation, when asked whether the conversation was serious or not, answered that they could not tell, but could tell what was said. We think that the circumstances and this testimony did tend to show that the defendant's offer was intended and understood to be merely jocose, and not in earnest, and that the court erred in not submitting to the jury to find how the parties, in fact, intended and understood it, in that respect.—Wheeler, J., *Bruce v. Bishop*, 43 Vt. 161, 163-164.

An appointment between two friends to go out for a walk or to read a book together is not an agreement in the legal sense: for it is not meant to produce, nor does it produce, any new legal duty or right, or any change in existing ones. Nothing but the absence of intention seems to prevent a contract from arising in many cases of this kind. A. asks B. to dinner, and B. accepts. Here is proposal and acceptance of something to be done by B. at A.'s request—namely, coming to A.'s house at the appointed time, and the trouble and expense of doing this are ample consideration for A.'s promise to provide a dinner. Why is A. not legally bound to have meat and drink ready for B., so that if A. had forgotten his invitation and gone

TAYLOR AND ANOTHER, ASSIGNEES OF WALSH, A BANKRUPT, v. BREWER AND OTHERS.

IN THE KING'S BENCH, MAY 8, 1813.

[Reported in 1 Maule & Selwyn 290.]

ASSUMPSIT to recover a compensation for work done by the bankrupt. The defendants composed a committee for the management of the sale of lottery tickets, and the bankrupt was employed in going backward and forward upon their business. The plaintiffs founded their claim to compensation on the following resolution of the committee: January 4th, 1810, at a meeting, etc., present, Brewer, etc., Resolved, that any service to be rendered by Walsh shall, after the third lottery be *taken into consideration, and such remuneration be made as shall be deemed right*.¹ Lord Ellenborough, C.J., was of opinion at the trial, that under this resolution it was optional in the committee to remunerate the bankrupt or not, according as they should think right, and therefore nonsuited the plaintiffs.

Park moved to set aside the nonsuit, on the ground that the bankrupt was entitled to some recompense; inasmuch as an agreement with a person that he should do work, and should have what is right for it, did not import that he should have nothing for his trouble if his employer should be so minded, but that he should have a reasonable reward: it should have been left therefore to the jury to consider what was reasonable, as was done in *Peacock v. Peacock*.²

LORD ELLENBOROUGH, C.J. In that case the defendant expressly told the plaintiff that he should have a share in the busi-

elsewhere B. should have a right of action? Only because no legal bond was intended by the parties. It might possibly be said that these are really cases of contract, and that only social usage and the trifling amount of pecuniary interest involved keep them out of courts of justice. But I think Savigny's view, which is here adopted, is the better one. There is not a contract which it would be ridiculous to enforce, but the original proposal is not the proposal of a contract.—Pollock on Contracts, 4th ed., 2.—ED.

¹ Ryan, one of the plaintiffs below, had testified that "we had no contract for this work, and before we began it I had a conversation with Mr. Hurlburt about it. I wanted to know what we would be paid for it, and he said that Mr. Vaughan would do what was right." This was claimed to be a contract for reasonable compensation. It was for the jury to say whether the conversation was with a contractual intent or not. The court had no right to assume as a matter of law that it was not, and refuse a charge on that aspect of the case.—Lamar, J., *Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 275-276.—ED.

² 2 Camp. N. P. C. 45.

ness, leaving only unsettled what particular share he was to have : but here, I own it struck me, was an engagement accepted by the bankrupt on no definite terms, but only in confidence that if his labor deserved anything he should be recompensed for it by the defendants. This was throwing himself upon the mercy of those with whom he contracted ; and the same thing does not unfrequently happen in contracts with several of the departments of government.

GROSE, J. I consider the resolution to import that the committee were to judge whether any or what recompense was right.

LE BLANC, J. It seems to me to be merely an engagement of honor.

BAYLEY, J. The fair meaning of the resolution is this, that it was to be in the breast of the committee whether he was to have anything, and if anything, then how much.

Rule refused.

MARY ANN WILLIAMS v. WILLIAM CARWARDINE.

IN THE KING'S BENCH, APRIL 18, 1833.

[*Reported in 4 Barnewall & Adolphus 621.*]

ASSUMPSIT to recover £20, which the defendant promised to pay to any person who should give such information as might lead to a discovery of the murder of Walter Carwardine. Plea, general issue. At the trial before Park, J., at the last spring assizes for the county of Hereford, the following appeared to be the facts of the case : One Walter Carwardine, the brother of the defendant, was seen on the evening of March 24th, 1831, at a public-house at Hereford, and was not heard of again till his body was found on April 12th in the river Wye, about two miles from the city. An inquest was held on the body on April 13th and the following days till the 19th ; and it appearing that the plaintiff was at a house with the deceased on the night he was supposed to have been murdered, she was examined before the magistrates, but did not then give any information which led to the apprehension of the real offender. On April 25th the defendant caused a hand-bill to be published, stating that whoever would give such information as should lead to a discovery of the murder of Walter Carwardine should, on conviction, receive a reward of £20 ; and any person concerned therein, or privy thereto (except the party who actually committed the offence), should be entitled to such reward, and every exertion

used to procure a pardon ; and it then added, that information was to be given, and application for the above reward was to be made to Mr. William Carwardine, Holmer, near Hereford. Two persons were tried for the murder at the summer assizes 1831, but acquitted. Soon after this, the plaintiff was severely beaten and bruised by one Williams, and on August 23d, 1831, believing she had not long to live, and to ease her conscience, she made a voluntary statement, containing information which led to the subsequent conviction of Williams. Upon this evidence it was contended, that as the plaintiff was not induced by the reward promised by the defendant to give evidence, the law would not imply a contract by the defendant to pay her the £20. The learned Judge was of opinion, that the plaintiff, having given the information which led to the conviction of the murderer, had performed the condition on which the £20 was to become payable, and was therefore entitled to recover it ; and he directed the jury to find a verdict for the plaintiff, but desired them to find specially whether she was induced to give the information by the offer of the promised reward. The jury found that she was not induced by the offer of the reward, but by other motives.¹

Curwood now moved for a new trial. There was no promise to pay the plaintiff the sum of £20. That promise could only be enforced in favor of persons who should have been induced to make disclosures by the promise of reward. Here the jury have found that the plaintiff was induced by other motives to give the information. They have, therefore, negatived any contract on the part of the defendant with the plaintiff.

DENMAN, C.J. The plaintiff, by having given information which led to the conviction of the murderer of Walter Carwardine, has brought herself within the terms of the advertisement, and therefore is entitled to recover.

LITTLEDALE, J. The advertisement amounts to a general promise, to give a sum of money to any person who shall give information which might lead to the discovery of the offender. The plaintiff gave that information.

PARKE, J. There was a contract with any person who performed the condition mentioned in the advertisement.

PATTESON, J. I am of the same opinion. We cannot go into the plaintiff's motives.

Rule refused.

¹ The jury will probably find that the £20 was not the motive. We may, I think, assume that it was not. The motive was the state of her own feelings.—Parke, J., *Williams v. Carwardine*, 5 C. & P. 566, 572.—ED.

FRANK HEWITT v. JOHN ANDERSON ET AL.

IN THE SUPREME COURT OF CALIFORNIA, OCTOBER, 1880.

[Reported in 56 California Reports 476.]

APPEAL from a judgment for the defendants, and from an order denying a new trial, in the Eighteenth District Court, County of San Bernardino. McNealy, J.

Paris & Allen and H. Goodcell for appellant.

John W. Satterwhite and Byron Waters for respondents.

SHARPSTEIN, J. The defendant signed and caused to be published an instrument, of which the following is a copy :

" We, the undersigned, promise and agree to pay the sum set opposite our names for the arrest and conviction of any person who has, within the past six months, maliciously, and with intent to commit arson, burned any building in the town of San Bernardino, or who may in the future, with said intent, set fire to, attempting to burn, or shall burn, or cause to be burned, any building in the limits of said town." Opposite to the name of each of the defendants a certain amount is set, and the aggregate of those amounts is \$900, for which the plaintiff sues. The findings of the Court, with one exception, are in favor of the plaintiff. That one is as follows : " That none of the acts of plaintiff were done with a view to obtaining said reward, or any part thereof, but all of said acts were done without any intention of claiming said reward, or any part thereof."

If this finding is justified by the evidence, the judgment rendered in favor of defendants cannot be disturbed. The evidence upon this point is conflicting. The plaintiff, on the trial, testified that he did do the acts upon which he bases his claim to the reward with a view to obtaining it. On the other hand, there was evidence introduced by the defendants which tended to prove that the plaintiff had stated, under oath, that he had not expected any reward. In view of that conflict, we would not disturb a finding either way. And we are satisfied, that under that finding the plaintiff cannot recover in this action. If he did not do the acts upon which he now bases his right to recover, with the intention of claiming the reward in the event of his accomplishing what would entitle him to it, he cannot recover it. If he had not known that a reward had been offered, he might, upon the authority of some cases, recover. But we are not aware of any case in which it has been held that a party, after disclaiming any intention to claim a reward, could recover it.

Judgment and order affirmed.

MYRICK, J., and THORNTON, J., concurred.

(b) Effect of Mistake.

RAFFLES v. WICHELHAUS AND ANOTHER.

IN THE EXCHEQUER, JANUARY 20, 1864.

[Reported in 2 Hurlstone & Coltman 906.]

DECLARATION. For that it was agreed between the plaintiff and the defendants, to wit, at Liverpool, that the plaintiff should sell to the defendants, and the defendants buy of the plaintiff, certain goods, to wit, 125 bales of Surat cotton, guaranteed middling fair merchant's Dhollorah, to arrive ex Peerless from Bombay; and that the cotton should be taken from the quay, and that the defendants would pay the plaintiff for the same at a certain rate, to wit, at the rate of $17\frac{1}{4}$ l. per pound, within a certain time then agreed upon after the arrival of the said goods in England. Averments: that the said goods did arrive by the said ship from Bombay in England, to wit, at Liverpool, and the plaintiff was then and there ready and willing and offered to deliver the said goods to the defendants, etc. Breach: that the defendants refused to accept the said goods or pay the plaintiff for them.

Plea. That the said ship mentioned in the said agreement was meant and intended by the defendants to be the ship called the Peerless, which sailed from Bombay, to wit, in October; and that the plaintiff was not ready and willing, and did not offer to deliver to the defendants any bales of cotton which arrived by the last-mentioned ship, but instead thereof was only ready and willing, and offered to deliver to the defendants 125 bales of Surat cotton which arrived by another and different ship, which was also called the Peerless, and which sailed from Bombay, to wit, in December.

Demurrer, and joinder therein.

Milward in support of the demurrer. The contract was for the sale of a number of bales of cotton of a particular description, which the plaintiff was ready to deliver. It is immaterial by what ship the cotton was to arrive, so that it was a ship called the Peerless. The words "to arrive ex Peerless," only mean that if the vessel is lost on the voyage, the contract is to be at an end. [POLLOCK, C.B. It would be a question for the jury whether both parties meant the same ship called the Peerless.] That would be so if the contract was for the sale of a ship called the Peerless; but it is for the sale of cotton on board a ship of that name. [POLLOCK, C.B. The defendant only bought that cotton which was to arrive by a particular

ship. It may as well be said, that if there is a contract for the purchase of certain goods in warehouse A., that is satisfied by the delivery of goods of the same description in warehouse B.] In that case there would be goods in both warehouses ; here it does not appear that the plaintiff had any goods on board the other Peerless. [MARTIN, B. It is imposing on the defendant a contract different from that which he entered into. POLLOCK, C.B. It is like a contract for the purchase of wine coming from a particular estate in France or Spain, where there are two estates of that name.] The defendant has no right to contradict by parol evidence a written contract good upon the face of it. He does not impute misrepresentation or fraud, but only says that he fancied the ship was a different one. Intention is of no avail, unless stated at the time of the contract. [POLLOCK, C.B. One vessel sailed in October and the other in December.] The time of sailing is no part of the contract.

Mellish (Cohen with him) in support of the plea. There is nothing on the face of the contract to show that any particular ship called the Peerless was meant ; but the moment it appears that two ships called the Peerless were about to sail from Bombay there is a latent ambiguity, and parol evidence may be given for the purpose of showing that the defendant meant one Peerless and the plaintiff another. That being so, there was no consensus *ad idem*, and therefore no binding contract. He was then stopped by the Court.

Per CURIAM.¹ There must be judgment for the defendants.

Judgment for the defendants.

FOSTER *v.* MACKINNON.

IN THE COMMON PLEAS, JULY 5, 1869.

[*Reported in Law Reports, 4 Common Pleas 704.*]

ACTION by indorsee against indorser on a bill of exchange for £3000 drawn on November 6th, 1867, by one Cooper upon and accepted by one Callow, payable six months after date, and indorsed successively by Cooper, the defendant, J. P. Parker, T. A. Pooley & Co., and A. G. Pooley, to the plaintiff, who became the holder for value (having taken it in part-payment of a debt due to him from A. G. Pooley) before it became due, and without notice of any fraud.²

¹ Pollock, C.B., Martin, B., and Pigott, B.

² See *supra*, p. 1, n. 1.—ED.

The pleas traversed the several indorsements, and alleged that the defendant's indorsement was obtained from him by fraud.

The cause was tried before Bovill, C.J., at the last spring assizes at Guildford. The defendant, who was a gentleman far advanced in years, swore that the indorsement was not in his handwriting, and that he had never accepted nor indorsed a bill of exchange ; but there was evidence that the signature was his ; and Callow, who was called as a witness for the plaintiff, stated that he saw the defendant write the indorsement under the following circumstances : Callow had been secretary to a company engaged in the formation of a railway at Sandgate, in Kent, in which the defendant (who had property in the neighborhood) was interested ; and the defendant had some time previously, at Callow's request, signed a guarantee for £3000, in order to enable the company to obtain an advance of money from their bankers. Callow took the bill in question (which was drawn and indorsed by Cooper) to the defendant, and asked him to put his name on it, telling him it was a guarantee ; whereupon the defendant, in the belief that he was signing a guarantee similar to that which he had before given (and out of which no liability had resulted to him), put his signature on the back of the bill immediately after that of Cooper. Callow only showed the defendant the back of the paper : it was, however, in the ordinary shape of a bill of exchange, and bore a stamp, the impress of which was visible through the paper.

The Lord Chief Justice told the jury that, if the indorsement was not the signature of the defendant, or if, being his signature, it was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if the defendant was not guilty of any negligence in so signing the paper, he was entitled to the verdict.

The jury returned a verdict for the defendant.

Sir J. D. Coleridge, S.G., in Easter Term last, obtained a rule *nisi* for a new trial, on the grounds of misdirection, and that the verdict was against evidence.

Ballantine, Serjt., Brown, Q.C., and *Archibald* showed cause.

Sir J. D. Coleridge, S.G., *Sir G. Honyman, Q.C.*, and *Talfourd Salter* in support of the rule.

July 5th. The judgment of the Court (Bovill, C.J., Byles, Keating, and Montague Smith, JJ.) was delivered by

BYLES, J. This was an action by the plaintiff, as indorsee of a bill of exchange for £3000, against the defendant, as indorser. The defendant by one of his pleas traversed the in-

endorsement, and by another alleged that the defendant's indorsement was obtained from him by fraud. The plaintiff was a holder for value before maturity, and without notice of any fraud.

There was contradictory evidence as to whether the indorsement was the defendant's signature at all ; but, according to the evidence of one Callow, the acceptor of the bill, who was called as a witness for the plaintiff, he, Callow, produced the bill to the defendant, a gentleman advanced in life, for him to put his signature on the back, after that of one Cooper, who was payee of the bill and first indorser, Callow not saying that it was a bill, and telling the defendant that the instrument was a guarantee. The defendant did not see the face of the bill at all. But the bill was of the usual shape, and bore a stamp, the impress of which stamp was visible at the back of the bill. The defendant signed his name after Cooper's, he the defendant (as the witness stated) believing the document to be a guarantee only.

The Lord Chief Justice told the jury that, if the indorsement was not the defendant's signature, or if, being his signature, it was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if the defendant was not guilty of any negligence in so signing the paper, the defendant was entitled to the verdict. The jury found for the defendant.

A rule *nisi* was obtained for a new trial, first, on the ground of misdirection in the latter part of the summing up ; and, secondly, on the ground that the verdict was against the evidence.

As to the first branch of the rule, it seems to us that the question arises on the traverse of the indorsement. The case presented by the defendant is, that he never made the contract declared on ; that he never saw the face of the bill ; that the purport of the contract was fraudulently misdescribed to him ; that, when he signed one thing, he was told and believed that he was signing another and an entirely different thing ; and that his mind never went with his act.

It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterward signs ; then, at least if there be no negligence, the signature so obtained is of no force.

And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature ; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.

The authorities appear to us to support this view of the law. In *Thoroughgood's Case*¹ it was held that, if an illiterate man have a deed falsely read over to him, and he then seals and delivers the parchment, that parchment is nevertheless not his deed. In a note to *Thoroughgood's Case*, in *Fraser's* edition of *Coke's Reports*, it is suggested that the doctrine is not confined to the condition of an illiterate grantor ; and a case in *Keilwey's Reports*² is cited in support of this observation. On reference to that case, it appears that one of the judges did there observe that it made no difference whether the grantor were lettered or unlettered. That, however, was a case where the grantee himself was the defrauding party. But the position that, if a grantor or covenantor be deceived or misled as to the *actual contents* of the deed, the deed does not bind him, is supported by many authorities. See *Com. Dig. Fait* (B. 2) ; and is recognized by *Bayley, B.*, and the Court of Exchequer, in the case of *Edwards v. Brown*.³ Accordingly, it has recently been decided in the Exchequer Chamber, that, if a deed be delivered, and a blank left therein be afterward improperly filled up (at least if that be done without the grantor's negligence), it is not the deed of the grantor. *Swan v. North British Australasian Land Company*.⁴

These cases apply to deeds ; but the principle is equally applicable to other written contracts. Nevertheless, this principle, when applied to negotiable instruments, must be and is limited in its application. These instruments are not only assignable, but they form part of the currency of the country. A qualification of the general rule is necessary to protect innocent transferees for value. If, therefore, a man write his name across the back of a blank bill-stamp, and part with it, and the paper is afterward improperly filled up, he is liable as indorser. If he write it across the face of the bill, he is liable as acceptor, when the instrument has once passed into the hands of an innocent indorsee for value before maturity, and liable to the extent of any sum which the stamp will cover.

In these cases, however, the party signing knows what he is doing : the indorser intended to indorse, and the acceptor intended to accept, a bill of exchange to be thereafter filled up,

¹ 2 Co. Rep. 9 b.

³ 1 C. & J. 312.

² Keilw. 70, pl. 6.

⁴ 2 H. & C. 175.

leaving the amount, the date, the maturity, and the other parties to the bill undetermined.

But, in the case now under consideration, the defendant, according to the evidence, if believed, and the finding of the jury, never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. It was not his design, and, if he were guilty of no negligence, it was not even his fault that the instrument he signed turned out to be a bill of exchange. It was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album, or on an order for admission to the Temple Church, or on the fly-leaf of a book, and there had already been, without his knowledge, a bill of exchange or a promissory note payable to order inscribed on the other side of the paper. To make the case clearer, suppose the bill or note on the other side of the paper in each of these cases to be written at a time subsequent to the signature, then the fraudulent misapplication of that genuine signature to a different purpose would have been a counterfeit alteration of a writing with intent to defraud, and would therefore have amounted to a forgery. In that case, the signer would not have been bound by his signature, for two reasons : first, that he never in fact signed the writing declared on ; and, secondly, that he never intended to sign any such contract.

In the present case, the first reason does not apply, but the second reason does apply. The defendant never intended to sign that contract, or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the *actual contents* of the instrument.

We are not aware of any case in which the precise question now before us has arisen on bills of exchange or promissory notes, or been judicially discussed. In the case of *Ingham v. Primrose*,¹ and the case of *Nance v. Lary*,² both cited by the plaintiff, the facts were very different from those of the case before us, and have but a remote bearing on the question. But, in *Putnam v. Sullivan*, an American case, reported in 4 Mass. 45, and cited in *Parsons on Bills of Exchange*, vol. i., p. 111, n., a distinction is taken by Chief Justice Parsons between a case where an indorser intended to indorse such a note as he actually indorsed, being induced by fraud to indorse it, and a case where he intended to endorse a different note and for a different purpose. And the Court intimated an opinion

¹ 7 C. B. (N.S.) 83 ; 28 L. J. (C.P.) 294.

² 5 Alabama, 370, cited 1 *Parsons on Bills*, 114, n.

that, even in such a case as that, a distinction might prevail and protect the indorsee.

The distinction in the case now under consideration is a much plainer one ; for, on this branch of the rule, we are to assume that the indorser never intended to indorse at all, but to sign a contract of an entirely different nature.

For these reasons, we think the direction of the Lord Chief Justice was right.

With respect, however, to the second branch of the rule, we are of opinion that the case should undergo further investigation. We abstain from giving our reasons for this part of our decision only lest they should prejudice either party on a second inquiry.

The rule, therefore, will be made absolute for a new trial.
Rule absolute.

F. W. Mount for plaintiff.

Barlow, Bowling & Williams for defendant.

ABRAM RUPLEY ET AL. v. JOHN F. DAGGETT.

IN THE SUPREME COURT OF ILLINOIS, SEPTEMBER TERM, 1874.

[*Reported in 74 Illinois Reports 351.*]

APPEAL from the Circuit Court of Will County ; the Hon. JOSIAH MCROBERTS, Judge, presiding.

This was an action of replevin, brought by John F. Daggett against Abram Rupley and Jacob Rupley, to recover a mare which the defendants claimed they had bought of the plaintiff.

It appears that at the first conversation about the sale of the mare, Rupley asked the plaintiff his price, the plaintiff swearing that he replied \$165, while the defendant testified that he said \$65, and that he did not understand him to say \$165. In the second conversation Rupley says he told Daggett, that if the mare was what he represented her to be, they would give \$65, and Daggett said he would take him down next morning to see her. Daggett denied this, and says that Rupley said to him, " Did I understand you sixty-five ? " Daggett states that he supposed Rupley referred to the fraction of the \$100, and meant sixty-five as coupled with the price named at the previous interview. He answered, " Yes, sixty-five." Both parties, from this, supposed the price was fixed, Rupley supposing it was \$65, and Daggett supposing it was \$165, and the only thing remaining to be done, as each thought, was for Rupley to see

the mare and decide whether she suited him. The next day Rupley came, saw the mare and took her home with him. The plaintiff recovered in the court below, and the defendants appealed.

Fellows & Leonard for the appellants.

Hill & Dibell for the appellee.

SCOTT, J., delivered the opinion of the Court.

It is very clear, from the evidence in this case, there was no sale of the property understandingly made. Appellee supposed he was selling for \$165, and it may be appellant was equally honest in the belief that he was buying at the price of \$65. There is, however, some evidence tending to show that appellant Rupley did not act with entire good faith. He was told, before he removed the mare from appellee's farm, there must be some mistake as to the price he was to pay for her. There is no dispute this information was given to him. He insisted, however, the price was \$65, and expressed his belief he would keep her if there was a mistake. On his way home with the mare in his possession, he met appellant, but never intimated to him he had been told there might be a misunderstanding as to the price he was to pay for her. This he ought to have done, so that, if there had been a misunderstanding between them, it could be corrected at once. If the price was to be \$165, he had never agreed to pay that sum, and was under no sort of obligation to keep the property at that price. It was his privilege to return it. On the contrary, appellee had never agreed to sell for \$65, and could not be compelled to part with his property for a less sum than he chose to ask. It is according to natural justice, where there is a mutual mistake in regard to the price of an article of property, there is no sale, and neither party is bound. There has been no meeting of the minds of the contracting parties, and hence there can be no sale. This principle is so elementary it needs no citation of authorities in its support. Any other rule would work injustice and might compel a person to part with his property without his consent, or to take and pay for property at a price he had never contracted to pay.

There was no error in refusing instructions asked by appellants. The Court was asked to tell the jury if they believed, from the evidence, appellee had "sworn wilfully and corruptly false in any material portion of his testimony, then they are at liberty to disregard his entire testimony, except so far as it may be corroborated by other evidence in the case." Conceding this instruction states a correct abstract principle of law, there was no necessity for giving it under the facts proven in this

case. The verdict was right, and appellants were not prejudiced by the refusal of the Court to give it.

All that was pertinent to the issues in the other refused instructions was contained in others that were given, and there was no necessity for repeating it.

No material error appearing in the record, the judgment must be affirmed.

Judgment affirmed.

JAMES CUNDY AND T. BEVINGTON, APPELLANTS v.
THOMAS LINDSAY AND OTHERS, RESPONDENTS.

IN THE HOUSE OF LORDS, MARCH 1-4, 1878.

[*Reported in Law Reports, 3 Appeal Cases 459.*]

APPEAL from a decision of the Court of Appeal, which had reversed a previous decision of the Queen's Bench.

In 1873 one Alfred Blenkarn hired a room at a corner house in Wood Street, Cheapside—it had two side windows opening into Wood Street, but though the entrance was from Little Love Lane, it was by him constantly described as 37, Wood Street, Cheapside. His agreement for this room was signed "Alfred Blenkarn." The now respondents, Messrs. Lindsay & Co., were linen manufacturers, carrying on business at Belfast. In the latter part of 1873, Blenkarn wrote to the plaintiffs on the subject of a purchase from them of goods of their manufacture—chiefly cambric handkerchiefs. His letters were written as from "37, Wood Street, Cheapside," where he pretended to have a warehouse, but in fact occupied only a room on the top floor, and that room, though looking into Wood Street on one side, could only be reached from the entrance in 5, Little Love Lane. The name signed to these letters was always signed without any initial as representing a Christian name, and was, besides, so written as to appear "Blenkiron & Co." There was a highly respectable firm of W. Blenkiron & Son, carrying on business in Wood Street—but at number 123, Wood Street, and not at 37. Messrs. Lindsay, who knew the respectability of Blenkiron & Son, though not the number of the house where they carried on business, answered the letters, and sent the goods addressed to "Messrs. Blenkiron & Co., 37, Wood Street, Cheapside," where they were taken in at once. The invoices sent with the goods were always addressed in the same way. Blenkarn sold the goods, thus fraudulently obtained from Messrs. Lindsay, to different persons, and among the rest he

sold 250 dozen of cambric handkerchiefs to the Messrs. Cundy, who were *bonâ fide* purchasers, and who resold them in the ordinary way of their trade. Payment not being made, an action was commenced in the Mayor's Court of London by Messrs. Lindsay, the junior partner of which firm, Mr. Thompson, made the ordinary affidavit of debt, as against Alfred Blenkarn, and therein named Alfred Blenkarn as the debtor. Blenkarn's fraud was soon discovered, and he was prosecuted at the Central Criminal Court, and convicted and sentenced. Messrs. Lindsay then brought an action against Messrs. Cundy as for unlawful conversion of the handkerchiefs. The cause was tried before Mr. Justice Blackburn, who left it to the jury to consider whether Alfred Blenkarn, with a fraudulent intent to induce the plaintiffs to give him the credit belonging to the good character of Blenkiron & Co., wrote the letters, and by fraud induced the plaintiffs to send the goods to 37, Wood Street—were they the same goods as those bought by the defendants—and did the plaintiffs by the affidavit of debt intend, as a matter of fact, to adopt Alfred Blenkarn as their debtor. The first and second questions were answered in the affirmative, and the third in the negative. A verdict was taken for the defendants, with leave reserved to move to enter the verdict for the plaintiffs. On motion accordingly, the Court, after argument, ordered the rule for entering judgment for the plaintiffs to be discharged, and directed judgment to be entered for the defendants.¹ On appeal, this decision was reversed and judgment ordered to be entered for the plaintiffs, Messrs. Lindsay.²

This appeal was then brought.

The Solicitor-General (Sir H. S. Giffard) and Benjamin, Q.C. (B. Francis Williams was with them) for the appellants.

Wills, Q.C., and Fullarton for the respondents.

THE LORD CHANCELLOR (LORD CAIRNS). My Lords, you have in this case to discharge a duty which is always a disagreeable one for any Court—namely, to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised upon both of them must fall. My Lords, in discharging that duty your Lordships can do no more than apply, rigorously, the settled and well-known rules of law.³

My Lords, the question, therefore, in the present case, as your Lordships will observe, really becomes the very short and simple one which I am about to state. Was there any contract

¹ 1 Q. B. D. 348.

² 2 Q. B. D. 96.

³ A portion of the opinion not relating to the question of contract has been omitted.—ED.

which, with regard to the goods in question in this case, had passed the property in the goods from the Messrs. Lindsay to Alfred Blenkarn? If there was any contract passing that property, even although, as I have said, that contract might afterward be open to a process of reduction, upon the ground of fraud, still, in the mean time, Blenkarn might have conveyed a good title for valuable consideration to the present appellants.

Now, my Lords, there are two observations bearing upon the solution of that question which I desire to make. In the first place, if the property in the goods in question passed, it could only pass by way of contract; there is nothing else which could have passed the property. The second observation is this, your Lordships are not here embarrassed by any conflict of evidence, or any evidence whatever as to conversations or as to acts done, the whole history of the whole transaction lies upon paper. The principal parties concerned, the respondents and Blenkarn, never came in contact personally—everything that was done was done by writing. What has to be judged of, and what the jury in the present case had to judge of, was merely the conclusion to be derived from that writing, as applied to the admitted facts of the case.

Now, my Lords, discharging that duty and answering that inquiry, what the jurors have found is in substance this: it is not necessary to spell out the words, because the substance of it is beyond all doubt. They have found that by the form of the signatures to the letters which were written by Blenkarn, by the mode in which his letters and his applications to the respondents were made out, and by the way in which he left uncorrected the mode and form in which, in turn, he was addressed by the respondents; that by all those means he led, and intended to lead, the respondents to believe, and they did believe, that the person with whom they were communicating was not Blenkarn, the dishonest and irresponsible man, but was a well-known and solvent house of Blenkiron & Co., doing business in the same street. My Lords, those things are found as matters of fact, and they are placed beyond the range of dispute and controversy in the case.

If that is so, what is the consequence? It is that Blenkarn—the dishonest man, as I call him—was acting here just in the same way as if he had forged the signature of Blenkiron & Co., the respectable firm, to the applications for goods, and as if, when, in return, the goods were forwarded and letters were sent, accompanying them, he had intercepted the goods and intercepted the letters, and had taken possession of the goods, and of the letters which were addressed to, and intended for,

not himself, but the firm of Blenkiron & Co. Now, my Lords, stating the matter shortly in that way, I ask the question, how is it possible to imagine that in that state of things any contract could have arisen between the respondents and Blenkarn, the dishonest man? Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never, even for an instant of time, rested upon him, and as between him and them there was no *consensus* of mind which could lead to any agreement or any contract whatever. As between him and them there was merely the one side to a contract, where, in order to produce a contract, two sides would be required. With the firm of Blenkiron & Co. of course there was no contract, for as to them the matter was entirely unknown, and therefore the pretence of a contract was a failure.

The result, therefore, my Lords, is this, that your Lordships have not here to deal with one of those cases in which there is *de facto* a contract made which may afterward be impeached and set aside, on the ground of fraud; but you have to deal with a case which ranges itself under a completely different chapter of law, the case, namely, in which the contract never comes into existence. My Lords, that being so, it is idle to talk of the property passing. The property remained, as it originally had been, the property of the respondents, and the title which was attempted to be given to the appellants was a title which could not be given to them.

My Lords, I therefore move your Lordships that this appeal be dismissed with costs, and the judgment of the Court of Appeal affirmed.

LORD HATHERLEY. My Lords, I have come to the same conclusion as that which has just been expressed by my noble and learned friend on the woolsack. The real question we have to consider here is this: whether or not any contract was actually entered into between the respondents and a person named Alfred Blenkarn, who imposed upon them in the manner described in the verdict of the jury; the case that was tried being one as between the alleged vendors and a person who had purchased from Alfred Blenkarn.

Now the case is simply this, as put by the learned Judge in the Court below; it was most carefully stated, as one might expect it would be by that learned Judge: "Is it made out to your satisfaction that Alfred Blenkarn, with a fraudulent intent to induce customers generally, and Mr. Thompson in particular, to give him the credit of the good character which belonged to William Blenkiron & Sons, wrote those letters in the way you have heard, and had those invoices headed as you have heard,"

and farther than that, "did he actually by that fraud induce Mr. Thompson to send the goods" "to 37, Wood Street?"

Both these questions were answered in the affirmative by the jury. What, then, was the result? It was, that there were letters written by a man endeavoring by contrivance and fraud, as appears upon the face of the letters themselves, to obtain the credit of the well-known firm of Blenkiron & Co., Wood Street. That was done by a falsification of the signature of the Blenkirons, writing his own name in such a manner as that it appeared to represent the signature of that firm. And farther, his letters and invoices were headed "Wood Street," which was not an accurate way of heading them; for he occupied only a room on a third floor, looking into Little Love Lane on one side, and looking into Wood Street on the other. He headed them in that way, in order that by these two devices he might represent himself to the respondents as Blenkiron of Wood Street. He did that purposely; and it is found that he induced the respondents by that device to send the goods to Blenkiron of Wood Street. I apprehend, therefore, that if there could be said to have been any sale at all, it failed for want of a purchaser. The sale, if made out upon such a transaction as this, would have been a sale to the Blenkirons of Wood Street, if they had chosen to adopt it, and to no other person whatever—not to this Alfred Blenkarn, with whom the respondents had not, and with whom they did not wish to have, any dealings whatever.

My Lords, it appears to me that that brings the case completely within the authority of *Hardman v. Booth*,¹ where it was held that there was no real contract between the parties by whom the goods were delivered and the concoctor of the fraud who obtained possession of them, because they were not *to him* sold. Exactly in the same way here, there was no real contract whatever with Alfred Blenkarn; no goods had been delivered to anybody except for the purpose of transferring the property to Blenkiron (not Blenkarn); therefore the case really in substance is the identical case of *Hardman v. Booth*² over again.

My noble and learned friend who sits opposite to me (Lord Penzance) has called my attention to a case which seems to have been decided on exactly the same principle as *Hardman v. Booth*,³ and it is worth while referring to it as an additional authority upon that principle of law. It is the case of *Higsons v. Burton*.⁴ There one Dix, who had been the agent of a responsible firm that had had dealings with the plaintiff in the action, was dismissed by his employers; he concealed that dis-

¹ 1 H. & C. 803.

² *Ibid.*

³ *Ibid.*

⁴ 26 L. J. (Ex.) 342.

missal from a customer of the firm, the plaintiff in the action, and, having concealed that dismissal, continued to obtain goods from him still as acting for the firm. The goods were delivered to him, but it was held that that delivery was not a delivery to any person whatever who had purchased the goods. The goods, if they had been purchased at all, would have been purchased by the firm for which this man had acted as agent ; but he had been dismissed from the agency—there was no contract, therefore, with the firm ; there was no contract ever intended between the vendors of the goods and the person who had professed to purchase the goods as the agent of that firm ; and the consequence was that there was no contract at all. There, as here, the circumstance occurred that an innocent person purchasing the goods from the person with whom there was no contract was obliged to submit to his loss. The point of the case is put so very shortly by Chief Baron Pollock, that I cannot do better than adopt his reasoning : “ There was no sale at all, but a mere obtaining of goods by false pretences ; the property, therefore, did not pass out of the plaintiffs.” The other Judges, who were Barons Martin, Branwell, and Watson, concurred in that judgment.

Here, I say, exactly as in those cases of *Hardman v. Booth*¹ and *Higsons v. Burton*,² there was no sale at all ; there was a representation, a false representation, made by Blenkarn, by which he got goods sent to him, upon applications from him to become a purchaser, but upon invoices made out to the firm of Blenkiron & Co. But no contract was made with Blenkarn, nor any contract was made with Blenkiron & Co., because they knew nothing at all about it, and therefore there could be no delivery of the goods with the intent to pass the property.

We have been pressed very much with an ingenious mode of putting the case on the part of the counsel who have argued with eminent ability for the appellants in this case—namely, suppose this fraudulent person had gone himself to the firm from whom he wished to obtain the goods, and had represented that he was a member of one of the largest firms in London. Suppose on his making that representation the goods had been delivered to him. Now I am very far, at all events on the present occasion, from seeing my way to this, that the goods being sold to him as representing that firm he could be treated in any other way than as an agent of that firm, or suppose he had said : “ I am as rich as that firm. I have transactions as large as those of that firm. I have a large balance at my bankers ;” then the sale would have been a sale to a fraudulent

¹ 1 H. & C. 803.

² 26 L. J. (Ex) 342.

purchaser on fraudulent representations, and a sale which would have been capable of being set aside, but still a sale would have been made to the person who made those false representations ; and the parting with the goods in that case might possibly—I say no more—have passed the property.

But this case is an entirely different one. The whole case, as represented here is this ; from beginning to end the respondents believed they were dealing with Blenkiron & Co., they made out their invoices to Blenkiron & Co., they supposed they sold to Blenkiron & Co., they never sold in any way to Alfred Blenkarn ; and therefore Alfred Blenkarn cannot, by so obtaining the goods, have by possibility made a good title to a purchaser, as against the owners of the goods, who had never in any shape or way parted with the property nor with anything more than the possession of it.

LORD PENZANCE. My Lords, the findings of the jury in this case, coupled with the evidence, warrant your Lordships in concluding that the following are the circumstances under which the respondents parted with their goods. Whether by so doing they passed the property in them to Alfred Blenkarn is, I conceive, the real question to be determined.

The respondents had never seen or even heard of Alfred Blenkarn, when they received a letter followed by several others signed in a manner which was not absolutely clear, but which the writer intended them to take, and which they did take, to be the signature of a well-known house of Blenkiron & Co., which in fact carried on business at No. 123, Wood Street. The purport of these letters was to order the goods now in question. The house of Blenkiron & Co. was known to the respondents, and it was also known that they lived in Wood Street, though the respondents did not know the number. The respondents answered these letters, addressing their answers to Blenkiron & Co. in Wood Street, but in place of No. 123, they directed them to No. 37, which was the number given in the letters as the address of that firm. In the result they sent off the goods now in dispute, and addressed them, as they had addressed their letters, to Blenkiron & Co., No. 37, Wood Street, London. It is not doubted or disputed that throughout this correspondence and up to, and after, the time that the respondents had dispatched their goods to London, they intended to deal and believed they were dealing with Blenkiron & Co., and with nobody else ; nor is it capable of dispute that, when they parted with the possession of their goods, they did so with the intention that the goods should pass into the hands of Blenkiron & Co., to whom they addressed these goods. The goods,

however, were not delivered to Blenkiron & Co., to whom they were addressed, but found their way to the hands of Alfred Blenkarn, owing to the number in Wood Street being given as No. 37, in place of No. 123—a mistake which had been purposely brought about by the writer of the letters as I have before mentioned, who was no other than Alfred Blenkarn, and who had an office or room at No. 37, Wood Street.

In this state of things, it is not denied that the contract, or dealing, which the respondents thought they were entering into with Blenkiron & Co., and in fulfilment of which they parted with their goods, and forwarded them to what they thought was the address of that firm, was no contract at all with them, seeing that Blenkiron & Co. knew nothing of the transaction. But, say the appellants, it was a contract with, and a good delivery to, Alfred Blenkarn so as to pass the property in the goods to that individual, although the goods were not addressed to him and the respondents did not know of his existence.

I am not aware, my Lords, that there is any decided case in which a sale and delivery intended to be made to one man, has been held to be a sale and delivery so as to pass the property to another, against the intent and will of the vendor. And if this cannot be, it is difficult to see how the contention of the appellants can be maintained. It was indeed argued that as the letters and goods were addressed to No. 37 instead of No. 123, this constituted a dealing with the person whose office was at No. 37. But to justify this argument it ought at least to be shown that the respondents knew that there was such a person, and that he had offices there—whereas the contrary is the fact, and the respondents only adopted the number because it was given as the address in letters purporting to be signed “Blenkiron & Co.”

My Lords, I am unable to distinguish this case in principle from that of *Hardman v. Booth*,¹ to which reference has been made. In that case Edward Gandell, who obtained possession of the plaintiff's goods, pretended to have authority to order goods for Thomas Gandell & Co., which he had not, and then intercepted the goods and made away with them; the Court held that there was no contract with Thomas Gandell & Co., as they had given no authority, and none with Edward Gandell, who had ordered the goods, as the plaintiffs never intended to deal with him.

In the present case Alfred Blenkarn pretended that he was, and acted as if he was, Blenkiron & Co., with whom alone the vendors meant to deal. No contract was ever intended with

¹ 1 H. & C. 803.

him, and the contract which was intended failed for want of another party to it. In principle the two cases seem to me to be quite alike.

Another case of a similar kind is that of *Higgon's v. Burton*,¹ to which similar reasoning was applied.

Hypothetical cases were put to your Lordships in argument in which a vendor was supposed to deal personally with a swindler, believing him to be some one else of credit and stability, and under this belief to have actually delivered goods into his hands. My Lords, I do not think it necessary to express an opinion upon the possible effect of some cases which I can imagine to happen of this character, because none of such cases can, I think, be parallel with that which your Lordships have now to decide. For in the present case the respondents were never brought personally into contact with Alfred Blenkarn; all their letters, although received and answered by him, were addressed to Blenkiron & Co., and intended for that firm only; and finally the goods in dispute were not delivered to him at all, but were sent to Blenkiron & Co., though at a wrong address.

This appeal ought therefore, in my opinion, to be dismissed.

LORD GORDON concurred.

Judgment appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, March 4th, 1878.

Charles O. Humphreys & Son for the appellants.

Ashurst, Morris, Crisp & Co. for the respondents.

SAMUEL A. STODDARD AND ANOTHER v. JOSEPH HAM.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER 10, 1880.

[*Reported in 129 Massachusetts Reports 383.*]

TORT for the conversion of a quantity of bricks. Answer, a general denial. Trial in the Superior Court, without a jury, before Pitman, J., who reported the case for the determination of this Court upon the following facts found by him:

The plaintiffs were manufacturers of and dealers in bricks, at Bangor, Me. The bricks in question were there purchased of the plaintiffs by Charles E. Leonard, who did a commission business in that city, but sometimes bought on his own account.

¹ 26 L. J. (Ex.) 342.

The plaintiffs supposed they were selling these bricks to the defendant through Leonard as his agent ; and they were sold on the credit of the defendant solely, and would not have been sold on the personal credit of Leonard ; but Leonard was not the agent of the defendant in this purchase, and had no authority to bind him. Leonard was not guilty of any false representations as to agency ; and it was a case of error and mistake on the part of the plaintiffs as to the principal with whom they were dealing.

The bricks were bought upon short credit, and were immediately sold by Leonard to the defendant, at a fixed price delivered in Boston, and were, in fact, bought with a view to such sale. The bricks remained in the plaintiffs' yard and possession until after the sale by Leonard to the defendant, and were afterward delivered by the plaintiffs at a wharf in Bangor, as directed by Leonard, and by him shipped to the defendant, Leonard taking the bills of lading in his own name. Leonard sold other bricks to the defendant, at or about the same time, and drew drafts against the aggregate cargoes, which were accepted and paid by the defendant, who also paid the freight on account of Leonard. From the proceeds, certain payments were made by Leonard to the plaintiffs, who supposed that they were made on the defendant's account, and they were credited to the latter. After the bricks were all delivered, Leonard failed in business, and no other payments were made. Leonard was largely indebted to the defendant, and he offset the claim of Leonard for the balance due him on the bricks by this antecedent indebtedness. After Leonard stopped payment, the plaintiffs made due demand on the defendant for the bricks, contending that they had never parted with the property in them, if the defendant repudiated the agency of Leonard ; and offered to repay the defendant for all advances and expenses incurred by him ; but the defendant refused to deliver them, and claimed to hold by purchase from Leonard. At the time of the demand, the defendant had on hand some of the bricks which came from the plaintiffs' yard ; the others had been sold and delivered by the defendant as they arrived.

Upon these facts, the judge ruled, as matter of law, that the plaintiffs could not recover ; and ordered judgment for the defendant. If the ruling was right, judgment was to be entered for the defendant ; otherwise, the case to stand for a new trial.

S. H. Tyng for the plaintiffs.

N. Morse for the defendant.

COLT, J. This case was tried without a jury, and there is no reason to doubt that, upon the facts found by the judge, it was

correctly ruled that the plaintiffs could not recover in tort for the conversion of the property in dispute.

It is not enough to give the plaintiffs a right to recover, that they supposed they were selling bricks to the defendant, through Leonard his agent, and that they would not have sold them to Leonard on his sole credit. The judge found that they were in fact sold to Leonard. There was no fraud, no false representation of agency, or pretence on the part of Leonard that he was buying for any one else. He was a commission merchant, who was in the habit of purchasing goods on his own account, and who honestly bought the bricks for himself, and sold them to the defendant as his own. It was not a case of mistaken identity. The plaintiffs knew that they were dealing with Leonard; they did not mistake him for the defendant; nothing was said as to any other party to the sale. The conclusion is unavoidable that the contract was with him. The difficulty is, that the plaintiffs, if they had any other intention, neglected then to disclose it. It was a mistake on one side, of which the other had no knowledge or suspicion, and which consisted solely in the unauthorized assumption that Leonard was acting as agent for a third person, and not for himself.

It is elementary in the law governing contracts of sale and all other contracts, that the agreement is to be ascertained exclusively from the conduct of the parties and the language used when it is made, as applied to the subject-matter and to known usages. The assent must be mutual, and the union of minds is ascertained by some medium of communication. A proposal is made by one party, and is acceded to by the other in some kind of language mutually intelligible, and this is mutual assent. Met. Con. 14. A party cannot escape the natural and reasonable interpretation which must be put on what he says and does, by showing that his words were used and his acts done with a different and undisclosed intention. *Foster v. Ropes*, 111 Mass. 10, 16; *Daley v. Carney*, 117 Mass. 288; *Wright v. Willis*, 2 Allen, 191. 2 Chit. Con. (11th Am. ed.) 1022. It is not the secret purpose, but the expressed intention, which must govern, in the absence of fraud and mutual mistake. A party is estopped to deny that the intention communicated to the other side was not his real intention. To hold otherwise would be to put it in the power of the vendor in every case to defeat the title of the vendee, and of those holding under him, by proving that he intended to sell to another person, and so there was no mutual assent to the contract.

In *Boston Ice Co. v. Potter*, 123 Mass. 28, cited by the plaintiffs, there was no privity of contract established between the

plaintiff and the defendant. There was no evidence afforded in the conduct and dealings of the parties, that the defendant assented to any contract whatever with the plaintiff. A stranger attempted to perform the contract of another party with the defendant.

In *Hardman v. Booth*, 1 H. & C. 803, there was abundant evidence that the contract was with another party, to whom the goods were sent, and not with the person who obtained possession of them and sold them to the defendant. In *Mitchell v. Lapage*, Holt N. P. 253, the goods were expressly bought of a firm, which, without the knowledge of the broker, had been dissolved by the withdrawal of two of its members.

We are referred to no case which supports the claim here made by the plaintiffs.

Judgment for the defendant.

JOHN EDMUNDS AND ANOTHER v. MERCHANTS' DESPATCH TRANSPORTATION COMPANY.

JOSIAH C. BENNETT AND ANOTHER v. SAME.

C. H. ABORN AND ANOTHER v. SAME.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JULY 3, 1883.

[*Reported in 135 Massachusetts Reports 283.*]

THREE ACTIONS OF TORT, with counts in contract, against a common carrier, to recover the value of certain goods entrusted to the defendant by the plaintiffs, at Boston, for carriage to Dayton, O. At the trial in the Superior Court, before Rockwell, J., the jury returned verdicts for the plaintiffs; and the defendant alleged exceptions. The facts appear in the opinion.

A. Russ & B. Kimball for the defendant.

S. B. Allen (*W. B. Allen* with him) for the plaintiffs.

MORTON, C.J. These three cases were tried together. In some features they resemble the case of *Samuel v. Cheney*, *ante*, 278. In other material features they differ from it. They also in some respects differ from each other. In two of the cases, a swindler, representing himself to be Edward Pape of Dayton, O., who is a reputable and responsible merchant, appeared personally in Boston, and bought of the plaintiffs the goods which are the subject of the suits respectively. In those cases, we think it clear, upon principle and authority, that there was a sale,

and the property in the goods passed to the purchaser. The minds of the parties met and agreed upon all the terms of the sale, the thing sold, the price and time of payment, the person selling, and the person buying. The fact that the seller was induced to sell by fraud of the buyer made the sale voidable, but not void. He could not have supposed that he was selling to any other person; his intention was to sell to the person present, and identified by sight and hearing; it does not defeat the sale because the buyer assumed a false name, or practised any other deceit to induce the vendor to sell.

In *Cundy v. Lindsay*, 3 App. Cas. 459, 464, where the question was whether a man, who in good faith had bought chattels of a swindler who had obtained possession of them by fraud, could hold them against the former owner, Lord Chancellor Cairns states the rule to be that, "if it turns out that the chattel has come into the hands of the person who professed to sell it, by a *de facto* contract—that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title."

In the cases before us, there was a *de facto* contract, purporting, and by which the plaintiffs intended, to pass the property and possession of the goods to the person buying them; and we are of opinion that the property did pass to the swindler who bought the goods. The sale was voidable by the plaintiffs; but the defendant, the carrier by whom they were forwarded, had no duty to inquire into its validity. The person who bought them, and who called himself Edward Pape, owned the goods, and upon their arrival in Dayton had the right to demand them of the carrier. In delivering them to him, the carrier was guilty of no fault or negligence. It delivered them to the person who bought and owned them, who went by the name of Edward Pape, and thus answered the direction upon the packages, and who was the person to whom the plaintiffs sent them. *Dunbar v. Boston & Providence Railroad*, 110 Mass. 26. The learned judge who tried the cases in the Superior Court based his charge upon a different view of the law; and, as the three cases were tried together, there must be a new trial in each.

It seems to have been assumed that the same questions are raised in each case. It is proper that we should add that the third case differs materially from the others. In that case, the contract did not purport, nor the plaintiffs intend, to sell to the person who was present and ordered the goods. The swindler introduced himself as a brother of Edward Pape of Dayton, O., buying for him. By referring to the mercantile agency, he

tacitly represented that he was buying for the Edward Pape who was there recorded as a man of means. The plaintiffs understood that they were selling, and intended to sell, to the real Edward Pape. There was no contract made with him, because the swindler who acted as his agent had no authority, but there was no contract of sale made with any one else. The relation of vendor and vendee never existed between the plaintiffs and the swindler. The property in the goods, therefore, did not pass to the swindler; and the defendant cannot defend, as in the other cases, upon the ground that it has delivered the goods to the real owner. *Hardman v. Booth*, 32 L. J. (N. S.) Ex. 105; *Kingsford v. Merry*, 26 L. J. (N. S.) Ex. 83; *Barker v. Dinsmore*, 72 Penn. St. 427.

Whether the defendant has any other justification or excuse for delivering the goods to the swindler is a question not raised by this bill of exceptions, and not considered at the trial; and therefore we cannot express an opinion upon it.

Exceptions sustained.

JOSEPH ROBERTSON *v.* MOSES COLEMAN AND AN-
OTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, FEB-
RUARY 26, 1886.

[*Reported in 141 Massachusetts Reports 231.*]

CONTRACT to recover the amount of a bank check for \$91.08, signed by the defendants, dated March 31st, 1883, and payable to the order of Charles Barney.¹ Trial in the Superior Court, before Knowlton, J., who reported the case for the determination of this court, in substance as follows:

On March 27th, 1883, a young man went to the Metropolitan Hotel in Boston, of which the plaintiff was the proprietor, and registered his name as Charles Barney. On that or the next day he took to the place of business of the defendants, who sold property as auctioneers, a team, of which he represented himself to be the owner, and which he desired them to sell on his account. He gave his name there as Charles Barney. In reply to an inquiry regarding him, they received a message by telegraph that Charles Barney, of Swanzev, was a responsible and trustworthy man. Believing him to be Charles Barney, of Swanzev, they sold the horse and carriage for him, and three days afterward gave him, in payment of the money received,

¹ See *supra*, p. 1, n. 1.—Ed.

the check declared on. On March 31st, he left the plaintiff's hotel, where he had been staying in the mean time under the name of Charles Barney, and, before going, he gave the check to the plaintiff in payment of his board bill of \$16.75, and received the balance of its amount in cash from the plaintiff. At the same time he endorsed it in blank with the name of Charles Barney. It turned out that Charles Barney was not his true name, and there was no evidence that he had ever gone by that name before registering at the plaintiff's hotel. The defendants discovered that he had stolen the team which he left with them, and, by their order, the bank upon which the check was drawn refused to pay it. It was in evidence that there was a person in existence by the name of Charles Barney, of Swanzey. It appeared that the plaintiff made no further inquiry as to the identity of the payee than for information which was founded upon the representations of his said lodger.

Upon these facts, the judge instructed the jury as follows: "If the person who took the team to the defendants' place of business left it there under the name of Charles Barney, and the defendants, in receiving it, dealt with him as Charles Barney, and sold the team for him, and three days afterward gave him the check in the belief that he was Charles Barney, of Swanzey, and was the owner of the team, and said person had in the mean time been boarding at the plaintiff's hotel under that name, and had gone by that name while at said hotel, the plaintiff, upon the receipt from him of said check in good faith, for a valuable consideration, with his endorsement upon it, acquired a good title to it as against the defendants."

The jury returned a verdict for the plaintiff. If the instruction was correct, judgment was to be entered upon the verdict; otherwise, such order to be made as law and justice might require.

S. J. Thomas & C. P. Sampson for the defendants.

C. F. Kittredge for the plaintiff.

FIELD, J. The name of a person is the verbal designation by which he is known, but the visible presence of a person affords surer means of identifying him than his name. The defendants, for a valuable consideration, gave the check to a person who said his name was Charles Barney, and whose name they believed to be Charles Barney, and they made it payable to the order of Charles Barney, intending thereby the person to whom they gave the check. The plaintiff received this check for a valuable consideration, in good faith, from the same person, whom he believed to be Charles Barney, and who endorsed the check by that name. It appears that the defendants thought

the person to whom they gave the check was Charles Barney, of Swanzey, a person in existence, but it does not appear that they thought so from any representations made by the person to whom they gave the check, although this, perhaps, is immaterial. It is clear from these facts, that, although the defendants may have been mistaken in the sort of man the person they dealt with was, this person was the person intended by them as the payee of the check, designated by the name he was called in the transaction, and that his endorsement of it was the endorsement of the payee of the check by that name. The contract of the defendants was to pay the amount of the check to this person or his order, and he has ordered it paid to the plaintiff. If this person obtained the check from the defendants by fraudulent representations, the plaintiff took it in good faith and for value. See *Samuel v. Cheney*, 135 Mass. 278; *Edmunds v. Merchants' Transportation Co.* 135 Mass. 283.

Judgment on the verdict.

BOYLAN *v.* HOT SPRINGS RAILROAD COMPANY.

IN THE SUPREME COURT OF THE UNITED STATES, NOVEMBER
11, 1889.

[*Reported in 132 United States Reports 146.*]

THIS was an action of *assumpsit* against a railroad corporation by a person who, after taking passage on one of its trains, was forcibly expelled by the conductor.

At the trial in the Circuit Court, the plaintiff testified that on March 18th, 1882, he purchased at the office of the Wabash, St. Louis & Pacific Railway Company, in Chicago, a ticket for a passage to Hot Springs and back (which is copied in the margin,¹ and which, as was alleged in the declaration and appeared

¹ Issued by Wabash, St. Louis & Pacific Railway. Tourist's special contract. Good for one first-class passage to Hot Springs, Ark., and return, when officially stamped on the back hereof, and presented with coupons attached.

In consideration of the reduced rate at which this ticket is sold, I, the undersigned, agree to and with the several companies over whose lines this ticket entitles me to be carried, as follows, to wit :

1. That in selling this ticket the Wabash, St. Louis & Pacific Railway Company acts as agent, and is not responsible beyond its own line.

2. That this ticket is not transferable, and no stop-over at any intermediate point will be allowed, unless specially provided for by the local regulations of the lines over which it reads.

3. That any alteration whatever of this ticket renders it void.

upon the face of the ticket, was then signed by him as well as by the ticket agent, and witnessed by a third person), and upon this ticket travelled on the defendant's railroad to Hot Springs.

He was asked by his counsel when he first actually knew that the ticket required him to have it stamped at Hot Springs. The question was objected to by the defendant, and ruled out by the Court.

He further testified that on April 19th, 1882, when leaving Hot Springs on his return to Chicago, he went to the baggage-office and requested the baggage-master to check his baggage, and, on his asking to see the ticket, showed it to him, and he thereupon punched the ticket, checked the baggage, and gave him the checks for it; and also that the gateman asked to see the ticket, and he showed it to him, and then passed through the gate, and took his seat in the cars. This testimony was objected to by the defendant, on the ground that no statement or action of the baggage-master, or of the gateman, would constitute a waiver of any of the written conditions of the contract; and it was admitted by the Court, subject to the objection.

4. That it is good for going passage only five (5) days from date of sale, as stamped on back and written below.

5. That it is not good for return passage, unless the holder identifies himself as the original purchaser, to the satisfaction of the authorized agent of the Hot Springs Railroad, at Hot Springs, Ark., within fifty-five (55) days from date of sale; and when officially signed and dated in ink, and duly stamped by said agent, this ticket shall then be good only five (5) days from such date.

6. That I, the original purchaser, hereby agree to sign my name, and otherwise identify myself as such, whenever called upon to do so by any conductor or agent of the line or lines over which this ticket reads.

7. That baggage liability is limited to wearing apparel not exceeding \$100 in value.

8. That the coupons belonging to this ticket will not be received for passage if detached.

9. That my signature shall be in manuscript and in ink.

10. That unless all the conditions on this ticket are fully complied with, it shall be void.

11. That I will not hold any of the lines named in this ticket liable for damages on account of any statement not in accordance with this contract made by any employé of said lines.

12. And it is especially agreed and understood by me that no agent or employé of any of the lines named in this ticket has any power to alter, modify or waive in any manner any of the conditions named in this contract.

Signature :	P. C. BOYLAN.
Witness :	H. C. KEERAN.

Date of sale, March 18th, 1882.

GEO. H. DANIELS,
Gen'l Ticket Agent.

The plaintiff then testified that soon after leaving Hot Springs the conductor, in taking the tickets of passengers, came to him, and, upon being shown his ticket, said it was not good, because he had failed to have it stamped at Hot Springs; the plaintiff replied that the baggage-master, when checking his baggage, had said nothing to him about it, and he did not know it was necessary; the conductor answered that he must either go back to Hot Springs and have the ticket stamped, or else pay full fare, but did not demand any specific sum of fare, or tell him what the fare was, and upon his refusing to pay another fare or to leave the train, forcibly put him off at the next station, notwithstanding he resisted as much as he could, and in so doing injured him in body and health.

On motion of the defendant, upon the grounds, among others, that this was an action of *assumpsit* for breach of contract, and that the plaintiff failed to produce to the conductor a ticket or voucher which entitled him to be carried on the train, and that until the plaintiff identified himself at the office at Hot Springs and had the ticket stamped and signed by the agent there, he had no subsisting contract between himself and the defendant for a return passage to Chicago, the Court declined to permit the plaintiff to testify to the consequent injury to his business and to his ability to earn money, excluded all evidence offered as to the force used in removing him from the train, and as to his expulsion from the train (although corresponding to allegations inserted in the declaration), and directed a verdict for the defendant.

The plaintiff excepted to the rulings of the Court, and, after verdict and judgment for the defendant, sued out this writ of error.

Charles Carroll Bonney for plaintiff in error.

G. W. Kretzinger for defendant in error.

JUSTICE GRAY, after stating the case as above reported, delivered the opinion of the court.

This is an action of *assumpsit*, and cannot be maintained without proof of a breach of contract by the defendant to carry the plaintiff. The only contract between the parties was an express one, signed by the plaintiff himself as well as by the defendant's agent at Chicago, and contained in a ticket for a passage to Hot Springs and back. The plaintiff, having assented to that contract by accepting and signing it, was bound by the conditions expressed in it, whether he did or did not read them or know what they were. The question, when he first knew that the ticket required him to have it stamped at Hot Springs, was therefore rightly excluded as immaterial.

By the express conditions of the plaintiff's contract, he had no right to a return passage under his ticket, unless it bore the signature and stamp of the defendant's agent at Hot Springs ; and no agent or employé of the defendant was authorized to alter, modify or waive any condition of the contract.

Neither the action of the baggage-master in punching the ticket and checking the plaintiff's baggage, nor that of the gate-man in admitting him to the train, therefore, could bind the defendant to carry him, or estop it to deny his right to be carried.

The plaintiff did not have his ticket stamped at Hot Springs, or make any attempt to do so, but insisted on the right to make the return trip under the unstamped ticket, and without paying further fare. As he absolutely declined to pay any such fare, the fact that the conductor did not inform him of its amount is immaterial.

The unstamped ticket giving him no right to a return passage, and he not having paid, but absolutely refusing to pay, the usual fare, there was no contract in force between him and the defendant to carry him back from Hot Springs.

There being no such contract in force, there could be no breach of it ; and no breach of contract being shown, this action of *assumpsit*, sounding in contract only, and not in tort, cannot be maintained to recover any damages, direct or consequential, for the plaintiff's expulsion from the defendant's train. The plaintiff, therefore, has not been prejudiced by the exclusion of the evidence concerning the circumstances attending his expulsion and the consequent injuries to him or his business.

The case is substantially governed by the judgment of this Court in *Mosher v. St. Louis, Iron Mountain & Southern Railway*, 127 U. S. 390, and our conclusion in the case at bar is in accord with the general current of decision in the courts of the several States. See, besides the cases cited at the end of that judgment, the following : *Churchill v. Chicago & Alton Railroad*, 67 Ill. 390 ; *Petrie v. Pennsylvania Railroad*, 13 Vroom 449 ; *Pennington v. Philadelphia, Wilmington & Baltimore Railroad*, 62 Md. 95 ; *Rawitzky v. Louisville & Nashville Railroad*, 40 La. Ann. 47.

Nor was anything inconsistent with this conclusion decided in either of the English cases relied on by the learned counsel for the plaintiff. Each of those cases turned upon the validity and effect of a by-law made by the railway company, not of a contract signed by the plaintiff ; and otherwise essentially differed from the case at bar.

In *Jennings v. Great Northern Railway*, L. R. 1 Q. B. 7, the by-law required every passenger to obtain a ticket before enter-

ing the train, and to show and deliver up his ticket whenever demanded. The plaintiff took a ticket for himself, as well as tickets for three horses and three boys attending them, by a particular train, which was afterward divided into two, in the first of which the plaintiff travelled, taking all the tickets with him ; and when the second train was about to start, the boys were asked to produce their tickets, and, being unable to do so, were prevented by the company's servants from proceeding with the horses. An action by the plaintiff against the company for not carrying his servants was sustained, because the company contracted with him only, and delivered all the tickets to him ; and Lord Chief Justice Cockburn, with whom the other judges concurred, said : " It is unnecessary to determine whether, if the company had given the tickets to the boys, and the boys had not produced their tickets, it would have been competent for the company to have turned them out of the carriage."

In *Butler v. Manchester, Sheffield & Lincolnshire Railway*, 21 Q. B. D. 207, the ticket referred to conditions published by the company, containing a similar by-law, which further provided that any passenger travelling without a ticket, or not showing or delivering it up when requested, should pay the fare from the station whence the train originally started. The plaintiff, having lost his ticket, was unable to produce it when demanded, and, refusing to pay such fare, was forcibly removed from the train by the defendant's servants. The Court of Appeal, reversing a judgment of the Queen's Bench Division, held the company liable, because the plaintiff was lawfully on the train under a contract of the company to carry him, and no right to expel him forcibly could be inferred from the provisions of the by-law in question, requiring him to show his ticket or pay the fare ; and each of the judges cautiously abstained from expressing a decided opinion upon the question whether a by-law could have been so framed as to justify the course taken by the company.

Judgment affirmed.

PHINEAS FONSECA v. CUNARD STEAMSHIP
COMPANY.IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, MAY 19,
1891.*[Reported in 153 Massachusetts Reports 553.]*

CONTRACT, with a count in tort, against the defendant, as owner of the steamship Samaria, for damage to the plaintiff's trunk and its contents. Trial in the Superior Court, without a jury, before Pitman, J., who reported the following case for the determination of this court.

The material facts, as found by an auditor to whom the case was referred, were as follows. The plaintiff took passage on the defendant's steamer from Liverpool to Boston. He had with him on the ship his trunk, containing articles of clothing and personal property reasonable and proper for an ocean traveller to carry as personal baggage, all of which were entirely ruined on the voyage by the negligence of the defendant. When the plaintiff engaged his passage in London, he received a passage ticket from the defendant's agent there. This ticket consisted of a sheet of paper of large quarto size, the face and back of which were covered with written and printed matter. Near the top of the face of the ticket, after the name of the defendant corporation and its list of offices in Great Britain, appeared in bold type the following: "Passengers' Contract Ticket." Upon the side margins were various printed notices to passengers, including the following: "All passengers are requested to take notice that the owners of the ship do not hold themselves responsible for detention or delay arising from accident, extraordinary or unavoidable circumstances, nor for loss, detention, or damage to luggage." The body of the face of the ticket contained statements of the rights of the passenger respecting his person and his baggage, the plaintiff's name, age, and occupation, the bills of fare for each day of the week, and the hours for meals, etc. At the bottom was printed the following: "Passengers' luggage is carried only upon the conditions set forth on the back hereof." Upon the back, among other printed matter, was the following: "The company is not liable for loss of or injury to the passenger or his luggage, or delay in the voyage, whether arising from the act of God, the Queen's enemies, perils of the sea, rivers, or navigation, restraint of princes, rulers, and peoples, barratry, or negligence of the company's servants (whether on board the steamer or not), defect

in the steamer, her machinery, gear, or fittings, or from any other cause of whatsoever nature."

When the plaintiff received his ticket, his attention was not called in any way to any limitation of the defendant's liability.

The judge, upon these facts, found and ruled "that the contract was a British contract; that, by the English law, a carrier may by contract exempt himself from liability, even for loss caused by his negligence; that in this case, as the carrier has so attempted, and the terms are broad enough to exonerate him, the question remains of assent on the part of the plaintiff. This has been decided in Massachusetts to be a question of evidence, in which the *lex fori* is to govern; that although it has been decided that the law conclusively presumes that a consignor knows and assents to the terms of a bill of lading or a shipping receipt which he takes without dissent, yet a passenger ticket, even though it be called a 'contract ticket,' does not stand on the same footing, that in this case assent is not a conclusion of law, and is not proved as a matter of fact." Upon the whole case, the judge ruled that the defendant company was not exempted from liability by the contract ticket, and found for the plaintiff.

If the rulings were wrong, the verdict was to be set aside, and judgment entered for the defendant; otherwise, the judgment was to be entered on the finding.

J. H. Appleton for the plaintiff.

G. Putnam & T. Russell for the defendant.

KNOWLTON, J. It is not expressly stated in the report, that the law of England was put in evidence as a fact in the case, but it seems to have been assumed at the trial, if not expressly agreed, that this law should be considered, and the argument before this court has proceeded on the same assumption. It is conceded that the presiding justice correctly found and ruled as follows: "That the contract was a British contract; that, by the English law, a carrier may by contract exempt himself from liability, even for loss caused by his negligence; that in this case, as the carrier has so attempted, and the terms are broad enough to exonerate him, the question remains of assent on the part of the plaintiff." That part of his ruling which is called in question by the defendant is as follows: "This has been decided in Massachusetts to be a question of evidence, in which the *lex fori* is to govern; that although it has been decided that the law conclusively presumes that a consignor knows and assents to the terms of a bill of lading or a shipping receipt which he takes without dissent, yet a passenger ticket, even

though it be called a 'contract ticket,' does not stand on the same footing; that in this case assent is not a conclusion of law, and is not proved as a matter of fact."

The principal question before us is whether the plaintiff, by reason of his acceptance and use of his ticket, shall be conclusively held to have assented to its terms. It has often been decided, that one who accepts a contract, and proceeds to avail himself of its provisions, is bound by the stipulations and conditions expressed in it, whether he reads them or not. *Rice v. Dwight Manuf. Co.* 2 Cush. 80; *Grace v. Adams*, 100 Mass. 505; *Hoadley v. Northern Transportation Co.* 115 Mass. 304; *Monitor Ins. Co. v. Buffum*, 115 Mass. 343; *Germania Ins. Co. v. Memphis & Charlestown Railroad*, 72 N. Y. 90. This rule is as applicable to contracts for the carriage of persons or property as to contracts of any other kind. *Grace v. Adams*, 100 Mass. 505; *Boston & Maine Railroad v. Chipman*, 146 Mass. 107; *Parker v. South Eastern Railway*, 2 C. P. D. 416, 428; *Harris v. Great Western Railway*, 1 Q. B. D. 515; *York Co. v. Central Railroad*, 3 Wall. 107; *Hill v. Syracuse, Binghamton & New York Railroad*, 73 N. Y. 351. The cases in which it is held that one who receives a ticket that appears to be a mere check showing the points between which he is entitled to be carried, and that contains conditions on its back which he does not read, is not bound by such conditions, do not fall within this rule. *Brown v. Eastern Railroad*, 11 Cush. 97; *Malone v. Boston & Worcester Railroad*, 12 Gray, 388; *Henderson v. Stevenson*, L. R. 2 H. L. Sc. 470; *Quimby v. Vanderbilt*, 17 N. Y. 306; *Railway Co. v. Stevens*, 95 U. S. 655. Such a ticket does not purport to be a contract which expressly states the rights of the parties, but only a check to indicate the route over which the passenger is to be carried, and he is not expected to examine it to see whether it contains any unusual stipulations. The precise question in the present case is whether the "contract ticket" was of such a kind that the passenger taking it should have understood that it was a contract containing stipulations which would determine the rights of the parties in reference to his carriage. If so, he would be expected to read it, and if he failed to do so, he is bound by its stipulations. It covered with print and writing the greater part of two large quarto pages, and bore the signature of the defendant company affixed by its agent, with a blank space for the signature of the passenger. The fact that it was not signed by the plaintiff is immaterial. *Quimby v. Boston & Maine Railroad*, 150 Mass. 365, and cases there cited. It contained elaborate provisions in regard to the

rights of the passenger on the voyage, and even went into such detail as to give the bill of fare for each meal in the day for every day of the week. No one who could read could glance at it without seeing that it undertook expressly to prescribe the particulars which should govern the conduct of the parties until the passenger reached the port of destination. In that particular, it was entirely unlike the pasteboard tickets which are commonly sold to passengers on railroads. In reference to this question, the same rules of law apply to a contract to carry a passenger, as to a contract for the transportation of goods. There is no reason why a consignor who is bound by the provisions of a bill of lading, which he accepts without reading, should not be equally bound by the terms of a contract in similar form to receive and transport him as a passenger. In *Henderson v. Stevenson*, *ubi supra*, the ticket was for transportation a short distance, from Dublin to Whitehaven, and the passenger was held not bound to read the notice on the back, because it did not purport to be a contract, but a mere check given as evidence of his right to carriage. In later English cases, it is said that this decision went to the extreme limit of the law, and it has repeatedly been distinguished from cases where the ticket was in a different form. *Parker v. South Eastern Railway*, 2 C. P. D. 416, 428; *Burke v. South Eastern Railway*, 5 C. P. D. 1; *Harris v. Great Western Railway*, 1 Q. B. D. 515. The passenger in the last-mentioned case had a coupon ticket, and it was held that he was bound to know what was printed as a part of the ticket. *Steers v. Liverpool, New York & Philadelphia Steamship Co.* 57 N. Y. 1, is in its essential facts almost identical with the case at bar, and it was held that the passenger was bound by the conditions printed on the ticket. In *Quimby v. Boston & Maine Railroad*, *ubi supra*, the same principle was applied to the case of a passenger travelling on a free pass, and no sound distinction can be made between that case and the case at bar.

We are of opinion that the ticket delivered to the plaintiff purported to be a contract, and that the defendant corporation had a right to assume that he assented to its provisions. All these provisions are equally binding on him as if he had read them.

The contract being valid in England, where it was made, and the plaintiff's acceptance of it under the circumstances being equivalent to an express assent to it, and it not being illegal or immoral, it will be enforced here, notwithstanding that a similar contract made in Massachusetts would be held void as against public policy. *Greenwood v. Curtis*, 6 Mass. 358; *Forepaugh v.*

Delaware, Lackawanna & Western Railroad, 128 Penn. St. 217, and cases cited. *In re* Missouri Steamship Co. 42 Ch. D. 321, 326, 327; Liverpool & Great Western Steam Co. v. Phenix Ins. Co. 129 U. S. 397.

Judgment for the defendant.

H. CLAY BASCOM v. J. HEBER SMITH.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JUNE
21, 1895.

[*Reported in 164 Massachusetts Reports 61.*]

CONTRACT on a guaranty. Trial in the Superior Court, before Dunbar, J., who allowed a bill of exceptions, in substance as follows:

In 1890 certain persons undertook the reorganization and capitalization of the Economo Duplex Stove Company, a corporation formed for the purpose of manufacturing stoves and ranges, with a view to manufacturing a more satisfactory range than the company had theretofore produced.

In pursuance of this plan the treasurer of the company, A. J. Webb, on August 8th, 1890, wrote to the plaintiff, who was a manufacturer of stove patterns in Troy, N. Y., enclosing specifications for a new range, and asking for an estimate of the cost of patterns. In this letter he said: "We have some money on hand that would enable us to go part way, at least, with a set of patterns, and I think we can get support that will enable us to complete them." To this letter the plaintiff replied, on August 4th, estimating the cost of wooden patterns of the proposed new range at from six to eight hundred dollars, and suggesting a personal interview.

In September of that year there was an informal meeting of the officers and stockholders of the company, at which the defendant was present, and the plans of reorganization and the preparation of new patterns were then considered.

The treasurer of the company testified that at this meeting a proposition was made by some one present to be one of several to advance a sum sufficient to order a complete set of wooden and iron patterns, and the president of the company, Walter H. Homans, testified that the defendant said he had a friend who intended to buy a thousand dollars' worth of stock, and that he, the defendant, would pledge himself \$500 on this set of patterns if necessary; that after the informal meeting the de-

fendant withdrew, and a meeting of the directors was held, at which, in reliance upon the defendants' guaranty of a sum to pay for the patterns, it was voted to send Webb to Troy to order them.

On the day following the meeting, the vote of the directors was brought to the attention of the defendant by Homans, who then, or later, obtained from him, out of the proceeds of the sale of certain shares of stock of the company held by him in trust, a sum of money to defray the expenses of Webb's journey to Troy, the purpose of which was understood by the defendant. On cross-examination, Homans testified that he did not understand that the order was to include wood and iron patterns; that nothing was said about wooden patterns, but it was understood simply that Webb was to go to Troy and order patterns, which, it was supposed by the witness, would be a complete set.

Thereafter Webb went to Troy, and ordered of the plaintiff a set of wooden patterns in case the cost did not exceed \$500, and at the same time represented that the defendant, who was financially reliable, was to be the responsible party, and he suggested that the plaintiff write to the defendant to obtain a corroboration of his representations. The plaintiff, therefore, on October 7th, 1890, wrote to the defendant:

"In minuting the preliminary details for a new set of range patterns for the Duplex Range Co., Mr. Webb mentions your willingness to, in some way, become responsible for work to the amount of \$500, and suggests that you will doubtless drop me a note to that effect. Our transactions with Mr. Webb have so indorsed his unchallenged integrity that I regard this letter as superfluous, but I write in harmony with his suggestion, and we hope to get up a real marketable construction."

On October 8th the defendant replied:

"Your esteemed favor of the 7th inst. just received. I feel sure that your confidence in Mr. Webb is well placed, but I hereby signify my willingness and intention to become responsible for the work of the new pattern, size No. 7, of the Duplex Stove Company to the amount of \$500, in the event of any such action on my part becoming necessary for any cause."

The plaintiff testified that Webb ordered a set of wooden patterns; and stated to him that the sole condition upon which the order was given was that the defendant had guaranteed the expense to the amount of \$500, and that the execution of the order was left contingent upon the defendant's confirmation of his statement; that the witness wrote to the defendant at Webb's suggestion, and relied on the defendant's assurance contained in his letter of October 8th.

There was evidence that the plaintiff made a set of wooden patterns as ordered by Webb, in accordance with the specifications, at a cost of \$500, for which he had not received payment.

About October 15th, 1890, Webb sent to the defendant the specifications for the patterns, and, later, a letter of the plaintiff to him dated October 11th, in which the plaintiff said : " Unless more work than we can foresee is required, we shall be able to produce the wood patterns, cast the iron patterns, file, joint, wax, and followboard complete for less than \$900."

Webb further testified, for the plaintiff, that after his return from Troy he called on the defendant, with whom he talked over the whole matter, and that thereafter he kept him informed of what was going on ; that about October 8th the defendant asked him whether the plaintiff had sent his bill, and if he had not, the defendant requested the witness to ascertain when he would send it, which the witness did ; that at one of his interviews with the defendant the latter made a statement signifying that he expected to pay the bill when it came ; not in terms, but in a remark to the effect that he would settle the bill if he had to sell a dog, or something of that sort.

There was evidence tending to show that, while the proposed reorganization was under consideration, and until after demand made for payment of the bill on February 17th, 1891, Homans was in almost daily communication with the defendant, and both Webb and Homans testified that they had never heard any suggestions from him that he expected anything other than a set of wooden patterns to be made.

The defendant testified that, at the informal meeting, in response to a request of the president of the company for a statement of his views, he said that he was certain of having \$500 paid to him by a friend for new stock of the company as soon as it was reorganized, but that he made no guaranty of any accounts to be opened by the company for new range or patterns, or any other statement in regard to guaranteeing as a basis for the action of the company, except the expression of his hope of selling the new stock ; that although he was a shareholder, he was not an officer of the company ; that in 1890 he was authorized by the company to attempt its capitalization, and to sell stock on commission ; that the proceeds of one of such sales were, at the request of Homans, held by the witness in trust for the uses of the company, out of which from time to time he paid to Homans certain sums, including the \$25 used by Webb for his expenses to Troy.

On October 28th, 1890, the defendant wrote to Homans :

" I am feeling much more hopeful of our success ultimately.

Mr. Chase called on me, and we had a pleasant chat for two hours last Friday. I guaranteed his stock, and should Mr. Bascom demand payment in advance of our reorganization and replenishment of the treasury by the raising of the \$25,000, I shall now meet him as promptly as possible. I hope, however, that we shall be ready for his entire bill in January, thereby saving me any loss through the guarantee of Mr. Chase's stock. I am hopeful that Mr. Chase will release me from this obligation of personal guarantee as soon as we are reorganized and the money put into the treasury, as promised by Mr. Houghton."

The defendant, in explanation of this letter, testified that he had arranged to sell to one Chase five hundred dollars' worth of stock in the company, with the agreement that he, the defendant, would see that Chase suffered no loss thereby, and would make good the five hundred dollars' worth of stock unless Chase received it in some other way, and that the previous suggestions made by him with regard to furnishing money to the company for the purpose of getting patterns were based on this sale of stock to Chase, from which only he expected to get the money. On cross-examination he testified that his holding out the prospect of his being able to pay \$500 was based upon his certainty of deriving that amount from Mr. Chase for the sale of the new stock under the reorganization; that he was promising this as treasurer; that he already held \$290; that he was not actually treasurer of the company, but a trustee, and expecting, upon the reorganization, to become treasurer.

On February 17th, 1891, payment was demanded of the defendant by letter.

The defendant contended that the contract between the plaintiff and the corporation, being a contract for wooden patterns alone, was not such a contract as was contemplated or intended either by the company or by himself; that it was not the contract which he understood was to be made, and was a contract so materially at variance with what the parties intended as not fairly to come within the terms of the guaranty, and that therefore he could not be bound.

At the close of the testimony the defendant requested the judge to rule that the evidence was insufficient to warrant a verdict for the plaintiff; but the judge declined so to rule, and the defendant excepted.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.¹

W. O. Kyle for the defendant.

H. E. Warner for the plaintiff.

¹ A portion of the statement of facts has been omitted.—ED.

FIELD, C. J. The Court undertook to construe the contract declared on with reference to all the circumstances which the evidence tended to establish as existing when it was made, and merely left it to the jury to determine whether the circumstances assumed had been established by the evidence. This is not leaving the whole construction of a written contract to the jury ; and the jury, by their verdict, have found that the circumstances were as they were assumed to be, and have construed the contract in the same manner as the court.

The principle of construing a writing most strongly against the party who wrote it, and proffered it, when it is reasonably capable of two constructions, and has been honestly understood and acted upon by the other party according to the construction which is most against the interest of the party proffering it, was announced in the charge of the presiding justice, not as an instruction to the jury, but as the rule adopted by the Court. It is a rule which has been adopted in certain cases of real ambiguity, although we have some doubt whether, on the circumstances shown, there was any need of invoking it in the present case. *Barney v. Newcomb*, 9 Cush. 46.

Assuming that the defendant knew that Webb, in behalf of the Economo Duplex Stove Company, had requested the plaintiff to make a new set of range patterns, of which there is no doubt, the letters of October 7th and October 8th, 1890, become intelligible enough. The plaintiff in his letter to the defendant of October 7th, 1890, indicates that he wishes to have a note in writing from the defendant confirming what Webb had said—namely, that the defendant would become responsible to the plaintiff for work on the new set of patterns ordered of the plaintiff to the amount of \$500, although the plaintiff politely says that he has such confidence in Webb's integrity that he regards a letter from the defendant as superfluous. The defendant, in his letter in reply, signifies in writing his present willingness and intention to become responsible to the plaintiff for work on such new set of patterns to the amount of \$500. The whole letter of the defendant shows that he expected that the plaintiff would go on and make a new set of patterns as ordered by Webb, and the evidence shows that he knew that the plaintiff did go on and make the patterns. There was evidence that the defendant understood that the plaintiff in doing so was relying upon his agreement to become responsible to the amount of \$500, and the jury must have so found. Upon such a finding no special notice of the acceptance of the guaranty or of the offer of guaranty was necessary. Knowledge was equivalent to notice. *Bishop v. Eaton*, 161 Mass. 496.

In view of the facts which the Court assumed in its hypothetical construction of the contract, which facts the jury must have found, the construction which the Court gave to the clause, "in the event of any such action on my part becoming necessary for any cause," seems to be the only reasonable one. It meant that if, for any cause, the company should be unable to pay for the new patterns, and it becomes necessary for the defendant to pay, he would pay for them up to the amount of \$500.

The defendant contends that he is not bound, because it is said that he understood that the contract between the plaintiff and the company was, or was to be, for a set of patterns of wood and another set of iron, whereas the order actually given by Webb was for a set of wooden patterns, and the plaintiff made only a set of wooden patterns, in conformity to the order.

Upon this point the instructions of the Court were as follows: "There is another matter to which I ought to refer, and that is the claim of the defendant that there was no guaranty of this contract, because he did not understand that the contract between the company and the plaintiff was a contract to make wooden patterns alone, but that he understood that the contract was to make a complete set of patterns, wood and iron both; and that inasmuch as he understood it that way, that was the contract, and not the contract to make a set of wooden patterns alone; and he agreed to guarantee a contract which, it appears upon the plaintiff's own showing now, was not the contract which he understood he was guaranteeing, that therefore he is not bound. The claim is not correct. If a man undertakes to guarantee a contract which he may know the terms of upon inquiry, and he makes no effort to find out what the terms are, but guarantees it, says, 'I will guarantee that contract,' and nobody misleads him about it, and he has an opportunity to know what it is if he sees fit, but does not take pains to find out, but guarantees it without knowing, he is bound. Now, whether that applies in this case you will determine upon the evidence."

We think that the instructions were correct. The meaning of the letters, construed with reference to the circumstances which the jury must have found, is that the defendant is to become responsible to the amount of \$500 for the work done by the plaintiff upon the new set of patterns, size No. 7, of the Economo Duplex Stove Company, which Webb, acting in behalf of the company, had ordered the plaintiff to make. There is nothing in the letters indicating whether the new patterns were to be of wood or of iron, or whether there were to be two sets of patterns, one of wood and the other of iron, and the defendant

guarantees payment to the amount of \$500 for the work to be done by the plaintiff on the patterns, size No. 7, of the Economo Duplex Stove Company which Webb had ordered. As Webb ordered only wooden patterns to be made, the defendant guaranteed payment for the patterns so ordered to the amount of \$500.

Exceptions overruled.

(c) *Necessity of communication of offer and acceptance.*

ABRAM FITCH AND PROSSER JONES, APPELLANTS, v.
ADRASTUS SNEDAKER, RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, JUNE, 1868.

[*Reported in 38 New York Reports 248.*]

WOODRUFF, J. On October 14th, 1859, the defendant caused a notice to be published, offering a reward of \$200 . . . "to any person or persons who will give such information as shall lead to the apprehension and conviction of the person or persons guilty of the murder of" a certain unknown female.

On October 15th, before the plaintiffs had seen or heard of the offer of this reward, one Fee was arrested and put in jail, and though not in terms so stated, the case warrants the inference, that, by means of the evidence given by the plaintiffs on his trial and their efforts to procure testimony, Fee was convicted.

This action is brought to recover the reward so offered. On the trial the plaintiffs proved the publication of the notice, and then proposed to prove that they gave information before the notice was known to them, which led to the arrest of Fee. This evidence was excluded. The plaintiffs then offered to prove that, with a view to this reward, they spent time and money, made disclosures to the District Attorney, to the Grand Jury, and to the Court on the trial after Fee was in jail, and that, without their effort, evidence, and exertion, no indictment or conviction could have been had. This evidence was excluded.

The Court thereupon directed a nonsuit.

It is entirely clear that, in order to entitle any person to the reward offered in this case, he must give such information as shall lead to both apprehension and conviction—that is, both must happen, and happen as a consequence of the information given. No person could claim the reward whose information caused the apprehension, until conviction followed; both are

conditions precedent. No one could therefore claim the reward who gave no information whatever until after the apprehension, although the information he afterward gave was the evidence upon which conviction was had, and however clear that, had the information been concealed or suppressed, there could have been no conviction. This is according to the plain terms of the offer of the reward, and is held in *Jones v. The Phoenix Bank* (8 N. Y. 228) ; *Thatcher v. England* (3 Com. Bench, 254).

In the last case it was distinctly held, that, under an offer of reward, payable "on recovery of property stolen and conviction of the offender," a person who was active in arresting the thief and finding and restoring part of the stolen property, giving information to the magistrates, tracing to London other of the property, and producing pawnbrokers with whom the prisoner had pledged it, and who incurred much trouble and expense in bringing together witnesses for the prosecution, was not entitled to the reward, as it appeared that another person gave the first information as to the party committing the robbery.

In the present case, the plaintiff, after the advertisement of the defendant's offer of a reward came to his knowledge, did nothing toward procuring the arrest, nor which led thereto, for at that time Fee had already been arrested.

The cases above referred to, therefore, establish, that, if no information came from the plaintiffs which led to the arrest of Fee, the plaintiffs are not entitled to recover, however much the information they subsequently gave, and the efforts they made to procure evidence, may have contributed to or even have caused his conviction, and, therefore, evidence that it was their efforts and information which led to his conviction was wholly immaterial, if they did not prove that they had given information which led to his apprehension, and was properly rejected.

The question in this case is simple. A murderer having been arrested and imprisoned in consequence of information given by plaintiff before he is aware that a reward is offered for such apprehension, is he entitled to claim the reward in case conviction follows?

The ruling on the trial, excluding all evidence of information given by the plaintiffs before they heard of this reward, necessarily answers this question in the negative.

The case of *Williams v. Carwardine* (4 Barn. & Ald. 621, and same case at the assizes, 5 Carr. & Payne, 566) holds that a person who gives information according to the terms of an offered reward is entitled to the money, although it distinctly appeared

that the informer had suppressed the information for five months, and was led to inform, not by the promised reward, but by other motives. The Court said the plaintiff had proved performance of the condition upon which the money was payable, and that established her title. That the Court would not look into her motives. It does not appear by the reports of this case whether or not the plaintiff had ever seen the notice or handbill posted by the defendant offering the reward, it does not, therefore, reach the precise point involved in the present appeal.

I perceive, however, no reason for applying to an offer of reward for the apprehension of a criminal, any other rules than are applicable to any other offer by one, accepted or acted upon by another, and so relied upon as constituting a contract.

The form of action in all such cases is *assumpsit*. The defendant is proceeded against as upon his contract to pay, and the first question is, Was there a contract between the parties?

To the existence of a contract there must be mutual assent, or in another form offer and consent to the offer. The *motive* inducing consent may be immaterial, but the consent is vital. Without that there is no contract. How, then, can there be consent or assent to that of which the party has never heard? On October 15th, 1859, the murderer, Fee, had, in consequence of information given by the plaintiffs, been apprehended and lodged in jail. But the plaintiffs did not, in giving that information, manifest any assent to the defendant's offer, nor act in any sense in reliance thereon, they did not know of its existence. The information was voluntary, and in every sense (material to this case) gratuitous. The offer could only operate upon the plaintiffs after they heard of it. It was *prospective* to those who will, in the future, give information, etc.

An offer cannot become a contract unless acted upon or assented to.

Such is the elementary rule in defining what is essential to a contract. (Chitty on Con., 5th Am. ed., Perkin's notes, p. 10, 9 and 2, and cases cited.) Nothing was here done to procure or lead to Fee's apprehension in view of this reward. Indeed, if we were at liberty to look at the evidence on the first trial, it would appear that Fee was arrested before the defendant offered the reward.

I think the evidence was properly excluded, and the nonsuit necessarily followed.

The judgment should be affirmed.

Judgment affirmed.¹

¹ The opinion of Clerke, J., has been omitted.—Ed.

THE MAYOR AND COMMON COUNCIL OF HOBOKEN,
PLAINTIFFS IN ERROR, *v.* GEORGE W. BAILEY,
DEFENDANT IN ERROR.

IN THE COURT OF ERRORS, AND APPEALS OF NEW JERSEY,
MARCH TERM, 1873.

[*Reported in 36 New Jersey Law Reports 490.*]

DEPUE, J.¹ The action is for the recovery of the bounty of \$350, under the resolution above set out. The judge charged the jury, *pro forma*, to find a verdict for the plaintiff, for the amount of the scrip, with interest from the time it was demanded by Hatfield, without leaving any question of fact for their determination. To sustain an exception to this charge, the plaintiffs in error assign, among other reasons, as a ground of reversal, that there was no evidence of any contract by the city to pay the plaintiff the bounty, or of any consideration to support a recovery. The argument was, that an offer of a bounty for enlistments is a proposal which does not become a contract until acceptance, and that no recovery can be had unless it appears that the plaintiff was influenced to volunteer by the offer, or at least had knowledge that a bounty was offered by the defendants, before he volunteered, so that it might be inferred that such offer had influenced his action.

There was no direct evidence that the plaintiff knew that any bounty was offered by the city. The proof was circumstantial, and by no means conclusive. In this respect this case differs from *Hawthorne v. Hoboken*, 6 *Vroom*, 247. If it be essential to the maintenance of the suit, that it should appear that the action of the volunteer in enlisting to the credit of the city, was prompted by the expectation of receiving the bounty offered by the resolution, there was a question of fact for the jury; and it was error in the charge to instruct the jury that the plaintiff was entitled to a verdict.

The city was under no obligation to answer the demand which had been made under the conscription law upon its citizens who were liable to draft. The act of the legislature, under the authority of which the resolution was passed, gave the corporate authorities the power to use the funds of the city to supply volunteers, but did not enjoin it upon them as a duty. The benefit accruing from the relief of the citizens from a draft was to individuals. Whatever aid was extended by the city toward the

¹ The statement of facts has been omitted.—ED.

accomplishment of that end was purely gratuitous, as an inducement to persons to come forward and volunteer to relieve individuals who were by law subject to the burden of the draft. The consideration for an undertaking of this kind is not the rendition of services beneficial to the promissor. In this respect the resolution of the common council is analogous to the offer of a reward for the apprehension of the perpetrator of a crime, by a person having no interest in the subject-matter of the offence. Such an offer enures as a contract to any person who performs the stipulated service, under or at the request of the offer. *Furman v. Parke*, 1 Zab. 310.

Upon what principle does the right of recovery in such cases rest? It cannot be maintained, on the proposal of a reward, or bounty, for no contract will be concluded by a mere offer; nor will it result from the fact of performance, for an interest in the subject to which the offer relates is not essential to the validity of the contract where the service is performed. The foundation of the right of action is the contract concluded between the parties, by the proposition by the one side, and its acceptance by the other, supported by the consideration which results from the performance of the stipulated service, on the faith of the promise contained in the offer. Such are the views of the nature of obligations of this kind expressed by Chief Justice Shaw in *Loring v. The City of Boston*, 7 Metc. 411, and by the Court of Appeals of New York in *Fitch v. Snedaker*, 38 N. Y. 248; *Howland v. Lounds*, 51 N. Y. 605. Substantially the same idea is expressed by Mr. Justice Randolph in *Furman v. Parke*. His language is: "No person is bound to offer a reward for the apprehension and conviction of a criminal, but if he does so, he tenders an agreement to the first person who complies with its terms, and he cannot then withdraw his offer; he has held out inducements on which the party has acted, and he has no right to withdraw his proposition then."

In the *City Bank v. Bangs*, 2 Edw. Ch. 95, which was a bill of interpleader to determine which of several claimants was entitled to a reward offered for the recovery of property which had been stolen, Vice-Chancellor McCoun adopted as the criterion for determining who was entitled to the reward, the inquiry, "Who is the person that has acquired a knowledge of the facts necessary to the detection or discovery of the things stolen or lost, and has imparted such knowledge with the intent and for the purpose of bringing about a recovery or restoration of the property, taking upon himself the risk and consequences of a failure, and acting with a view to the reward, if his suspicions and disclosures are well founded and successful." Upon

this criterion the Vice-Chancellor rejected the claim of a servant who first communicated to her mistress circumstances of suspicion which she had observed, upon which the mistress acted, and which led to the recovery of the property. The reasons assigned for such rejection were, that the conduct of the servant showed that she was not acting with a view to the reward, but was indifferent to any result that might follow from the information she gave, and was not influenced by any hope or expectation of the reward, in case her suspicions were well founded. In short, the rule laid down and enforced by the Vice-Chancellor was, that in order to entitle a person to a reward, the acts done by way of performance must be done with a view to the acceptance and performance of the contract tendered by the offer, in the expectation of earning the reward if the effort is crowned with success.

The right of action in such cases being founded in contract, for which no precedent consideration was paid, and in which no promisee is named, it would follow, as a necessary result, that in order to complete the contract and give it mutuality, an assent in some way to the terms of the offer must be given. *Fitch v. Snedaker*, 38 N. Y. 248; *Howland v. Lounds*, 51 N. Y. 605.

The case usually cited for the position that performance of the condition on which a reward is promised will entitle a party to recover, though he acted without knowledge of the offer, is *Williams v. Carwardine*, 4 B. & Ad. 621. The jury found that plaintiff made the disclosure not for the sake of the reward, but from a motive of revenge. The Court held that she was entitled to recover, and that the motive which influenced her to give the information was immaterial. As the case in banc is reported, it does not appear that the plaintiff acted without knowledge of the offer of a reward. In the report of the trial at *nisi prius*, it is manifest from the circumstances in evidence, and the argument of counsel, that the plaintiff's knowledge of the handbill offering the reward was not disputed. 5 C. & P. 566. If the correct theory of the action be the enforcement of a contract arising from an offer, and assent thereto, as shown by the fact that the stipulated service is performed with the knowledge that a reward was promised for doing it, as I think it is, the contract having been legally concluded, in giving effect to such contract, if it was performed, the motive which induced the party to make the contract or perform it must always be immaterial.

The point under discussion is not without adjudication in the

courts of sister States, whose decisions, if not authority, are entitled to great respect.¹

With respect to the proof there is generally but little difficulty. Where the action is for a reward for the apprehension of a criminal, or the restoration of lost property, it rarely happens but that something is done in performance of the condition, after the party has knowledge of the offer. So, also, in case of the claim for a bounty for an enlistment to the credit of a particular locality where no other bounty is offered, the notoriety of the offer, and the fact that no other supposable reason can be assigned for the credit, will afford a presumption of knowledge of the offer, and of the intention of the volunteer to entitle himself to the bounty by complying with the condition of the offer which the testimony of the volunteer may make conclusive.

No practical injustice can result from enforcing remedies in such cases on the basis of ordinary contracts. It is not necessary that the volunteer should have received notice of the terms proposed, or should have given notice of acceptance. It is enough that he had knowledge at his enlistment and credit of the offer, and acted with reference to it, and fulfilled the requirements of the offer. *Larimer v. McLean Co.*, 47 Ill. 36.

In every case it is a question of fact whether the contract was concluded by an acceptance, and is supported by an adequate consideration. It was peculiarly so in the case now before the court. The facts proved did not clearly establish either of these propositions, but, on the contrary, the circumstances strongly indicated that the plaintiff volunteered in ignorance of the bounty now sued for, and was induced to do so solely by the bounty offered by the county. The charge that the plaintiff was, as a matter of law, entitled to a verdict was erroneous, and the judgment should be reversed.

For reversal—The CHANCELLOR, CHIEF JUSTICE, DEPUE, SCUDDER, VAN SYCKEL, CLEMENT, DODD, GREEN, LATHROP, WALES—10.

For affirmance—DALRIMPLE—1.

¹ The citation of cases has been omitted, and only so much of the opinion is given as relates to the question of assent.—ED.

TINN v. HOFFMANN & CO.

IN THE EXCHEQUER CHAMBER, MAY 14, 15, 1873.

[Reported in 29 Law Times Reports, New Series, 271.]

THIS was an action brought by the plaintiff against the defendants to recover damages in respect of a breach of contract to deliver 800 tons of iron; and by the consent of the parties, and by order of Martin, B., dated May 30th, 1872, the facts were stated for the opinion of the Court of Exchequer in the following

SPECIAL CASE.

1. The plaintiff, Mr. Joseph Tinn, is an iron manufacturer, carrying on business at the Ashton Row Rolling Mills, near Bristol; and the defendant, who trades under the name and style of Hoffman & Co., is an iron merchant, carrying on business at Middlesboro'-on-Tees.

2. In the months of November and December, 1871, the following correspondence passed between the plaintiff and the defendant relating to the proposed purchase and sale of certain iron, the particulars of which fully appear in the letters hereinafter set forth:

The plaintiff to the defendant:

“NOVEMBER 22, 1871.

“MESSRS. HOFFMAN & CO.:

“DEAR SIR: Please quote *your lowest price for 800 tons No. 4 Cleveland, or other equally good brand, delivered at Portishead at the rate of 200 tons per month, March, April, May, and June, 1872. Payment by four months' acceptance.*

“Yours truly,

“J. TINN.”

3. The defendants' reply:

“ROYAL EXCHANGE BUILDINGS, MIDDLESBORO'-ON-TEES,

November 24, 1871.

“JOSEPH TINN, Esq., Bristol:

“DEAR SIR: We are obliged by your inquiry of the 22d inst., and by the present beg to offer you 800 tons No. 4 forge Middlesbro' pig iron (brand at our option, Cleveland if possible), at 69s. per ton delivered at Portishead, delivery 200 tons per

month, March, April, May, and June, 1872, payment by your four months' acceptance from date of arrival.

"We shall be very glad if this low offer would induce you to favor us with your order, and waiting your reply by return, we remain, dear sir, yours truly,

"A. HOFFMANN & CO."

4. The plaintiff to the defendant :

"BRISTOL, November 27, 1871.

"MESSRS. HOFFMAN & CO.:

"DEAR SIR: The price you ask is high. If I made the quantity 1200 tons, delivery 200 tons per month for the first six months of next year I suppose you would make the price lower? Your reply per return will oblige

"J. TINN."

5. The defendant to the plaintiff in reply :

"ROYAL EXCHANGE BUILDINGS, MIDDLESBRO'-ON-TEES,
November 28, 1871.

"JOSEPH TINN, Esq., Bristol :

"DEAR SIR: In reply to your favor of yesterday, we beg to state that we are willing to make you an offer of further 400 tons No. 4 forge Middlesbro' pig iron, 200 tons in January, 200 tons in February, at the same price we quoted you by ours of the 24th inst., though the rate of freight at the above-named time will doubtless be considerably higher than that of the following months.

"Our to-day's market was very firm again, and we feel assured we shall see a further rise ere long.

"Kindly let us have your reply by return of post as to whether you accept our offers of together 1200 tons and oblige yours truly,

"A. HOFFMANN & CO."

6. The plaintiff to the defendant :

"BRISTOL, November 28, 1871.

"MESSRS. HOFFMAN & CO.:

"No. 4 Pig iron.

"DEAR SIR: You can enter me 800 tons on the terms and conditions named in your favor of the 24th inst., but I trust you will enter the other 400, making in all 1200 tons, referred to in my last, at 68s. per ton. Yours faithfully,

"JOSEPH TINN."

7. The defendants' reply :

“ ROYAL EXCHANGE BUILDINGS, MIDDLESBRO'-ON-TEES,
November 29, 1871.

“ JOSEPH TINN, Esq.:

“ DEAR SIR : We are obliged by your favor of yesterday, in reply to which we are sorry to state that we are not able to book your esteemed order for 1200 tons No. 4 forge at a lower price than that offered to you by us of yesterday—viz., 69s., and even that offer we can only leave you on hand for reply by to-morrow before twelve o'clock. Waiting your reply, we remain, dear sir, yours truly,

“ A. HOFFMANN & Co.”

8. On December 1st, 1871, the plaintiff sent a telegram to the defendant, of which the following is a copy :

“ From TINN, Ashton.

“ To HOFFMAN & Co., Middlesbro'-on-Tees.

“ Book other 400 tons pig iron for me, same terms and conditions as before.”

And on the same day the plaintiff sent a letter to the defendant, of which the following is a copy :

“ DECEMBER 1, 1871.

“ MESSRS. HOFFMAN & Co.:

“ DEAR SIR : I have your favor of the 29th ult. Please enter the remaining 400 tons No. 4 Forge Pig at 69s. *ex-ship* Portishead, delivery to commence January, 1872, payment by four months' acceptance against delivery. Kindly send me sold note for the 800 and 400 tons, and oblige, yours truly,

“ J. TINN.”

9. The following correspondence then took place between the plaintiff and the defendants' clerk, duly authorized in that behalf.

The defendants' clerk to the plaintiff :

“ ROYAL EXCHANGE BUILDINGS, MIDDLESBRO'-ON-TEES,
December 1, 1871.

“ JOSEPH TINN, Esq., Bristol :

“ DEAR SIR : We have your telegram of this day, ' Book other 400 tons Pig iron, same terms and conditions as before,' which we note and shall lay before our Mr. Hoffman on his return next week. Yours truly, for A. Hoffman & Co.,

“ C. JERVELAND.”

10. Memorandum :

" DECEMBER 2, 1871.

" From A. HOFFMAN & Co., Middlesbro'-on-Tees.

" To JOSEPH TINN, Esq., Bristol :

" The contents of your yesterday's favor is noted, and we shall lay same before our principal on his return next week."

11. The defendants to the plaintiff :

" THE QUEEN'S HOTEL, MANCHESTER, December 4, 1871.

" JOSEPH TINN, Esq., Bristol :

" DEAR SIR : I am in receipt of telegram 'Book other 400 tons, same terms and conditions as before,' and favor of 1st inst. addressed to my firm, in reply to which I very much regret to state that I am not able to book the 1200 tons in question, as your reply to ours of November 28th and 29th did not reach us within the stipulated time ; and as I had other offers for the same lot, I disposed of the latter previous to my leaving Middlesbro' and receiving your decision.

" Trusting to be more fortunate in future, I remain, dear sir, yours truly,

" A. HOFFMAN & Co."

12. The plaintiff to the defendant :

" DECEMBER 5, 1871.

" MESSRS. HOFFMAN & Co.:

" DEAR SIRS : I regret you cannot enter me the 400 tons No. 4 Forge Pig on the same terms as the 800 tons. Please send me sold note for 800 tons per return. Yours truly,

" J. TINN."

13. The reply of the defendants :

" ROYAL EXCHANGE BUILDINGS, MIDDLESBRO'-ON-TEES,

December 6, 1871.

" JOSEPH TINN, Esq., Bristol :

" DEAR SIR : Your favor of yesterday to hand, in reply to which we have to state that we cannot send you contract for pig iron, having sold you none.

" The quotation for 1200 tons in our respect of 29th ult. was for your acceptance by 12 o'clock the 30th ; and failing to receive such we disposed of the iron, being under other offers, as already intimated to you by our Mr. Hoffman, and it is now utterly impossible for us to book you the quantity you require, or you may rest assured that we willingly would do so. We are, dear sir, yours truly,

" Pro A. Hoffman & Co.,

C. JERVELAND."

14. It is agreed that all the facts and circumstances mentioned in the above correspondence are true, and that the court are to have power to draw all inferences of facts in the same way as a jury might do.

15. The course of post between Bristol and Middlesbrough is one day.

16. The plaintiff contends that he has a binding contract with the defendant whereby the defendants are bound to deliver to him 800 tons of iron. The defendants, on the other hand, contend that there is no such contract, and refuse to deliver any of the said iron.

The questions for the opinion of the Court are, first, whether, upon the facts stated and documents set out in the case, there is any binding contract on the part of the defendants to deliver 800 tons of iron to the plaintiff; secondly, whether, upon the facts and documents set out in the case, there is any binding contract on the part of the defendants to deliver any quantity of iron to the plaintiff, and if yea, what quantity and on what terms and conditions.

If the Court shall be of opinion in the affirmative on either of these questions, then it has been agreed between the parties in writing in accordance with the provisions of the Common Law Procedure Act 1852, that the amount of damages for breach of such contract shall be ascertained by reference to an arbitrator to be appointed by the said plaintiff and defendants, or in case of difference by any judge of one of the superior Courts of Common Law, and judgment for the amount entered up for the plaintiffs with costs of suit.

If the Court shall be of opinion in the negative, then judgment of *nol. pros.* with costs of defence shall be entered up for the defendants.

The case came on for argument in the Court of Exchequer in Michaelmas Term last, when, after hearing counsel on both sides, the learned Barons were divided in opinion, Bramwell, Channell, and Pigott, BB., being of opinion that the defendants were entitled to judgment on the ground that there was in the correspondence no binding contract on the part of the defendants to deliver 800 tons of iron to the plaintiff. The defendants' offer of November 24th was never accepted by the plaintiff, his letter of the 28th being too late for that purpose. The defendants' letter of the 28th was an offer of 1200 tons, and was open only until noon on the 30th, and was not accepted by the plaintiff in time. The two offers cannot be separated. The Lord Chief Baron, on the other hand, gave his judgment in

favor of the plaintiff, being of opinion that the offers of the 800 and 400 tons were entirely distinct and separate, and that the defendants' letter of the 24th had been kept open and their offer therein of the 800 tons was accepted by the plaintiff in his letter of November 28th, and the defendants were thereby bound. The majority of the Court, however, being of a contrary opinion, judgment was entered for the defendants, whereupon the plaintiff brought error to this Court.

The plaintiff's points for argument : First, that there is a binding contract on the part of the defendants to deliver to the plaintiff 800 tons of iron ; secondly, that there is a binding contract on the part of the defendants to deliver to the plaintiff certain tons of iron on the terms and conditions contained in the documents set out in the special case herein.

The defendants' points for argument : First, that there is no binding contract between the defendants and the plaintiff, inasmuch as they were never *ad idem* ; secondly, that the defendants' offer on November 24th, 1871, to supply 800 tons, was not accepted by the plaintiff in his letter in answer thereto of November 27th, 1871 ; thirdly, that the defendants' further offer on November 28th, 1871, to supply 1200 tons was not accepted by the plaintiff in his letter in answer thereto of the same day ; fourthly, that the defendants' further offer on November 29th, 1871, to supply the said 1200 tons was conditional upon its being accepted by 12 o'clock on November 30th, 1871, and that the plaintiff never so accepted it.

Kingdon, Q.C. (with him was *Arthur Charles*) appeared to argue the case on the part of the plaintiff.

A. L. Smith (with him was *H. Lloyd, Q.C.*) argued *contra* on the part of the defendants.

Cur. adv. vult.

May 15.—The Court being divided in opinion the following judgments were now delivered *seriatim* :

HONYMAN, J. I am of opinion that the judgment of the Court below was wrong, and that judgment ought to be entered for the plaintiff in respect of 800 tons. The question depends entirely on the construction and effect of the defendant's letter of the 24th and the two letters of November 28th, 1871, one written by the plaintiff and the other by the defendants. The plaintiff had been inquiring at what price the defendants would let him have 800 tons of iron, and by their letter of November 24th they named 69s. per ton as the price for the 800 tons, to be delivered at the rate of 200 tons per month, in the four months of March, April, May, and June, 1872 ; and that letter concluded thus, "waiting your reply by return." Mr. King-

doñ, on the part of the plaintiff, admitted, and I think very properly, that the meaning of that was, we offer you that price, provided you accept it by return. Inasmuch as it was not accepted by return, as it stood, I presume had it stopped there, there would have been no contract. The plaintiff not only did not accept by return, but, on the contrary, he objected to the price, for on November 27th he wrote saying that the price was too high, and asking whether if he increased the quantity to 1200 tons, to be deliverable 200 tons per month—that is to say, in addition to the quantity he had already proposed for, to be delivered in March, April, May, and June, 1872, 400 tons more, to be delivered 200 tons in January and 200 in February, 1872, that would make the price lower. Upon that, on November 28th, the defendants wrote the following letter, on the construction of which I believe the difference of opinion among the members of the Court mainly arises. [Reads letter of that date.] What is the meaning of that letter? It amounts to this: On November 24th we offered you 800 tons for delivery at 69s.; we now repeat to you that offer, and in addition to that, we make a *further* offer of 400 tons more—that is, we renew the offer of November 24th, and we make you a further offer of 400 tons, provided you accept those offers “by return of post.” That does not mean exclusively a reply by letter by return of post, but you may reply by telegram or by verbal message, or by any means not later than a letter written and sent by return of post would reach us. If that is so, then comes the plaintiff’s letter, written on the same day, November 28th, which crossed the defendants’ letter of the same date, in which the plaintiff said, “You can enter me 800 tons on the terms and conditions named in your favor of the 24th inst., *but I trust* you will enter the other 400, making in all 1200 tons, referred to in my last, at 68s. per ton, *ex ship* Portishead.” I cannot agree in the opinion said to have been expressed by my Brothers Pigott and Channell in the Court below. As I understand, my Brother Pigott certainly says this is not a clean offer, or a clean acceptance, of 800 tons, but that it is 800 tons on the condition or hope or trust that they would lower the price of the other 400 tons. I cannot accede to that view of the case. I assume that it plainly amounts to this, “I will take your 800 tons on the terms and conditions mentioned in the letter of the 24th inst., but I *hope* you will let me have the other lot at 68s. per ton; if you choose to do that, well and good.” I cannot understand how it can be said that that is not an absolute acceptance of the 800 tons, supposing it was competent to the plaintiff to accept that quantity. In the Court below it seems to have been treated

as if the offer of November 28th was *one* offer of 1200 tons. I do not think so. I think it is a repetition of the offer of 800 tons coupled with a *further* offer of 400 tons, and that it was competent to the plaintiff to accept one and not accept the other. My Brother Bramwell appears to have thought that it was not material to consider whether it was two separate offers of 400 tons and 800 tons, or an offer of 1200 tons, because in either view of the case, the plaintiff could not accept the one and reject the other. If it is to be construed as strictly one offer of 1200 tons, I can understand it, and then of course he could not accept the one and reject the other. But I do not think it is one offer of 1200 tons, nor two offers, one of 400, and the other of 800 tons, but that it is a *repetition* of the offer of 800 tons, with a further offer of further 400 tons. To say that he could not accept the 400 tons without the 800 tons seems, in my view of the matter, to throw no light on the question whether he might accept the 800 tons without the 400 tons. That being so, it being in my judgment a separate offer of 800 tons, and 400 tons in addition, I should have thought, had the plaintiff's letter of the 28th been written on November 29th that nobody, but for the opinions which have been expressed here to-day, could have entertained a doubt that it would have been an acceptance. What, then, is the effect when the two letters are written on the same day and crossed each other in the post? Does that make any difference? On this part of the case, as far as I can gather from the notes that have been given us of the judgments below, my Brother Bramwell is of the same opinion as I am, because I understand him to say that, if he had thought that these were two offers, and that the two offers were capable of being accepted the one without the other, then the fact of the acceptance crossing the offer would have been no bar to the contract. After the plaintiff had written the letter of November 28th mentioning the 800 tons, it could not be said that he would not have been bound by the defendant's letter of the same date, if it had been written on November 29th. I do not see how it can be contended that there would not then have been a valid contract for 800 tons, except with regard to the question of whether it were one offer, or two offers. Of course, if it is one offer, that is one thing; but if it be two offers, then, if the defendants' letter of November 28th had been written on the 29th, after he had received the plaintiff's letter of the 28th, it could not be said that that did not make a good contract for 800 tons. I cannot see why the fact of the letters crossing each other should prevent their making a good contract. If I say I am willing to buy a man's house on certain terms, and he at

the same moment says that he is willing to sell it, and these two letters are posted so that they are irrevocable with respect to the writers, why should not that constitute a good contract? The parties are *ad idem* at one and at the same moment. On these grounds it appears to me that the judgment of the Court below was wrong, and ought to be reversed. I speak with some hesitation in this case when I find that the opinion of the majority of my brothers is against me, and also when the question turns entirely on the construction of a somewhat ambiguously written letter.

ARCHIBALD, J. I am of opinion that the judgment of the Court below was correct. The question turns upon the construction of these letters. In order to see the true meaning of the letter of November 29th, which is chiefly in question, we must pay attention to the whole correspondence. Now, in order to constitute a contract it is necessary that there should be an offer substantially accepted in terms, and we have to see whether there is anything of that kind to be gathered from this correspondence. The correspondence and negotiation begin with the plaintiff's letter of November 22d, asking the defendants to quote their "lowest price for 800 tons No. 4 Cleveland, or other equally good brand, delivered at Portishead at the rate of 200 tons per month, March, April, May, and June, 1872." To that the defendants reply on November 24th, "We are obliged by your inquiry of 22d inst., and by the present beg to offer you 800 tons No. 4 forge Middlesborough pig iron (brand in our option, Cleveland if possible) at 64s. per ton, delivered at Portishead, delivery 200 tons per month, March, April, May, and June, 1872." Then they add, "*Waiting your reply by return*, we remain," etc. Now if there had been a reply from the plaintiff by return, in the terms of that letter, saying, "You can enter me 800 tons on the terms and conditions named in your favor," there would have been undoubtedly a perfectly good contract; but, in the first place, there is no reply by return at all. The next letter from the plaintiff is on November 27th, in which, instead of accepting, he says, "The price you ask is high. If I made the quantity 1200, delivery 200 tons per month for the first six months of next year" (that is introducing a new element altogether), "I suppose you would make the price lower." That is a suggestion that he is asking for a lower price for 1200 tons, deliverable 200 tons per month, beginning in January instead of March; it is quite clear that the suggestion contained in that letter, that an offer should be made of 1200 tons, is an entire thing. In reply to that we have a letter of the defendants of November 28th, on which the question mainly turns.

in which they say, "In reply to your favor of yesterday, we beg to state that we are willing to make you an offer of further 400 tons," and so on, "200 tons in January, 200 tons in February, at the same price we quoted you by ours of the 24th inst., though the rate of freight at the above-named time will doubtless be considerably higher than that of the following months. . . . Kindly let us have your reply *by return of post* as to whether you accept our *offers of, together, 1200 tons.*" Now, then, dealing with that, the plaintiff's letter of November 27th is a proposal for 1200 tons, and for a delivery, beginning in January instead of in March; and, although the defendant's letter of the 28th concludes by the use of the word "*offers*" instead of "*offer*," we must take it altogether, and take it in connection with the plaintiff's letter of November 27th, "*our offers of together 1200 tons.*" I have not come to this conclusion without some hesitation during the course of the argument; but, upon the whole, the only conclusion at which I can arrive, looking at these letters together, is that this is, in substance, one offer of, together, 1200 tons; and, treating the original proposal which had not been accepted as at an end on November 27th, this is a fresh beginning of the negotiation. It is now an offer of 1200 tons for deliveries in these months at 69s., and not at a lower price; and, therefore, in order to constitute a good contract in writing, there must be an answer to that in the terms asked for, accepting it upon the terms offered. I think, therefore, that, if the plaintiff's letter of November 28th, which crossed the defendant's letter of the same date, had been written afterward, I could not have regarded it as an acceptance of the proposal in the defendant's letter. There is, in fact, no answer to that letter accepting it, unless the plaintiff's letter of November 28th, which crossed it, can be treated as amounting to an acceptance of an offer which the plaintiff, at the time, had never received. I do not think it is necessary, in giving judgment now, to further decide that, nor am I prepared to decide the question as to how far letters crossing each other may be treated as binding, or to decide whether that would amount to an acceptance or not, but I am not at all prepared to say that it would. The inclination of my mind is against holding that it would be an acceptance. I do not think it is necessary to go into that now; because if the defendant's letter of November 28th is in substance an offer of 1200 tons, the plaintiff's letter of that date, even if it had been written afterward, would not, in my judgment, have amounted to an acceptance. I think, therefore, there has been no offer accepted in terms, and that there has been no such contract as is alleged here, and for these reasons I think

the judgment of the Court below was correct, and should be affirmed.

QUAIN, J. I agree with my brother Honyman in thinking that the decision of the Court below is wrong. I agree also with the Lord Chief Baron in his judgment below, that there was a good contract in this case for 800 tons. The negotiation begins, and the object of it is to purchase 800 tons, and not 1200 tons. The first letter is the plaintiff's letter, "Please quote your lowest price for 800 tons delivered at the rate of 200 tons per month, March, April, May, and June, 1872." That was the plaintiff's object in opening the negotiation, and it is necessary to bear that in mind in order to see how the addition of 400 tons has been introduced into this contract. That letter is answered by the defendant's letter of November 24th making a distinct offer of 800 tons at 69s. Now, therefore, we have the offer made by this letter of the 24th, and that offer is open until the return of post on the next day; and had that offer been accepted by the plaintiff's posting a letter on the 25th it would have been a complete contract. It is well established (see *Dunlop v. Higgins*, 1 H. of L. Cas. 396-400) that posting a letter in reply to an offer completes the contract. Now, here there is no answer by return of post, nor until November 27th; but on that day, and after the time when that offer was open, the plaintiff writes this letter, treating the negotiation as I read it as still open; he does not reject the offer altogether on the score of price, but he makes the usual inquiry, "If I were to make the quantity larger, and were to take 1200 tons instead of 800 tons, deliverable in the first six months of next year, would you give it me at a lower price?" That is a mere letter of inquiry; it is not a letter saying "your price is too high, and I reject the 800 tons." The writer evidently thought the 800 tons were still reserved, and it is immaterial to the view I take of it whether he was right or wrong in so thinking. I have been trying to place myself in his position. It is plain that he thought the 800 tons offer was still in reserve, and that he might fall back on it, and he merely inquires whether, if he would take 1200 tons, the price would be lower. Now, in answer to that letter, came the defendants' letter of November 28th, on which the whole question practically turns, because, if that letter is to be construed as an entire and distinct offer of 1200 tons, and not as renewing the offer of the 24th, with an additional offer of 400 tons, then there would be no acceptance of the 1200 tons, and the judgment for the defendants would be right. According to the judgment of the learned barons in the Court below, as I understand, that was the point on which they differed. They all admitted that if

this letter could be properly construed to mean two offers, then there has been an acceptance of the 800 tons. What is this letter? It is an answer to the plaintiff's inquiry, "If I take 1200 tons will you do it for less?" That being the sole object of the letter of November 27th, it was idle to make a fresh offer of 1200 tons at the same price—the whole object being to try to get it at less. It would be idle and absurd, therefore, to say, We offer you 1200 tons at 69s., when the whole object of the negotiation was 800 tons, and when the price had not been lowered. I therefore read this letter in plain terms as simply saying, We renew the offer of 800 tons, which is therefore still open to you until the next post, and in addition to that you can have 400 tons more, to be delivered next year in two quantities of 200 tons each, and if I have an answer to either of these offers by return of post, that is sufficient. Accordingly they say it is an offer for a "further 400 tons," and they refer expressly to the letter of November 24th, "at the same price we quoted you by ours of the 24th inst.," thus incorporating the two letters together as though they were to be read as one letter, and they conclude it by saying, "Kindly let us have your reply by return of post as to whether you accept our *offers* of, together" (summing them up together at) "1200 tons." Now, as I read that letter, they incorporate with it their previous letter of the 24th, they do not make a distinct offer of 1200 tons, but they renew the offer of 800 tons, and add a further offer of 400 tons at the same price. As I have said before, it seems to me that the sole object of the plaintiff's inquiry is to know whether, if he took a larger quantity, the defendants would make the price less. The conditions of the letter of the 24th might have been waived at any time until the offer was renewed. The defendants, when they wrote and posted their letter of the 28th, renewed and re-opened the letter of the 24th, and kept it open until the return of post on the 29th. The defendant's offer of the 24th being re-opened, the plaintiff's letter of the 28th (and that is where I differ from the majority of the Court), is in answer to that letter and not to the letter that crossed it by anticipation. It says distinctly, in terms, "You can enter me 800 tons on the terms and conditions named *in your favor of the 24th.*" If, as I am of opinion is the case, the offer of November 24th was still open, when that letter was posted, there is a contract; and on that ground I am of opinion that the judgment below is wrong. I am fortified in this view by the correspondence. The plaintiff's letter of the 28th says: "You can enter me 800 tons on the terms and conditions named in your favor of the 24th;" and then it goes on, "but I trust you will enter the other 400,

making in all 1200 tons referred to in my last, at 68s. per ton, *ex ship* Portishead." That is closing the 800 tons, and offering to take other 400 tons, not a conditional offer, but an express closing with the offer of 800 tons, and the expression of a trust that the defendants will enter the other 400 tons. Then after the contract, as I think, was closed with regard to the 800 tons, came the defendants' letter of the 29th, not rejecting but closing, in my judgment, the contract for the 800 tons, not saying: "We cannot give you at once the 800 tons unless you take the 1200 tons," or anything of that kind, not in the slightest degree rejecting or saying that the contract with regard to the 800 tons was not closed; but, because the two together come to 1200 tons, saying, "We are obliged by your favor of yesterday, in reply to which we are sorry to state that we are not able to book your esteemed order"—that is to say, "we cannot take an addition of 400 tons to the 800 tons at a lower price than that offered to you by ours of yesterday—viz., 69s., and even this offer we can only leave you on hand for reply by to-morrow before 12 o'clock." It is idle to say that that offer, so far as relates to the 800 tons, should be kept open until 12 o'clock next day, because they had the letter in their hands, the plaintiff's letter, accepting it. Looking at the whole negotiation, the only contingency was as to the price of the extra 400 tons. I come to the conclusion from the terms of the letters, and looking at what appears to me to be the plain meaning of the parties, that as soon as the defendants would not give any additional quantity at a lesser price, the parties fell back on the first offer of 800 tons. For these reasons I think the judgment of the Court below was wrong and ought to be reversed.

GROVE, J. I am of opinion that the judgment of the Court below should be affirmed. After the plaintiff's letter of November 22d, asking for the price of the iron, the defendants' letter of the 24th is a distinct offer of 800 tons at 69s., to be delivered in certain particular months. Therefore I assume that, at that time, the vendors were ready to part with their iron under the particular conditions of that letter—namely, 200 tons in four particular months at a particular place, and at a certain price, which latter, it seems, was varying rapidly at that time. The letter concludes, "Waiting your reply by return." There was no reply by return, and consequently there was an end to that offer—there was then no contract, no bargain of any sort. On November 27th, a fresh negotiation was opened by the plaintiff, who begins by saying, "The price you ask is high. If I made the quantity 1200 tons, delivery 200 tons per month for the first six months of next year, I suppose you would make the price

lower." That is not an acceptance. The plaintiff does not seem to doubt that he might have the 1200 tons at the same price of 69s., but he offers to take an extra 400 tons, with a view to reducing the price if possible. That might, he thinks, be an inducement; and he therefore makes a new offer, as a commencement of a new negotiation. In answer to that the defendants write on November 28th, that is, six days after the original negotiation began, "In reply to your favor of yesterday we beg to state that we are willing to make you an offer of further 400 tons, 200 tons in January, 200 tons in February, at the same price we quoted you by ours of the 24th inst." It is clear that they consider it as an entirely new offer. It is an entirely different offer—namely, an offer of 1200 tons at the full price which was asked for the 800 tons; it is, in fact, an offer at a higher price. Then they say "kindly let us have your reply by return of post, as to whether you accept our offers," not of either the 800 tons or the 400 tons, but "of together 1200 tons." There was no reply, strictly speaking, to that letter, for it was to be by return of post, and there was no reply by return. Therefore, unless the letters which crossed each other in the post can be supposed to constitute a contract, the offer was not accepted, and there was an end to the case. But I assume for the moment that the plaintiff's letter of November 28th was written after the defendants had received the plaintiff's letter of the same date. The plaintiff does not say I accept your offers together, but (supposing this to amount to an acceptance) "you can enter me 800 tons on the terms and conditions named in your favor of the 24th inst., but I trust you will enter the other 400 tons, making in all 1200 tons referred to in my last at 68s. per ton *ex-ship* Portishead." Now I assume for the moment, that this is an acceptance so far as the 800 tons go; my opinion is that that is not the defendant's offer of November 28th, and that is enough, in my judgment, to decide the case. It is not an acceptance in the terms offered in the defendant's letter of the 28th, and therefore there was no contract. I think there are two other answers on which, although I do not express by any means a strong opinion, and do not give my decision upon the ground of them, still I am inclined to think that they are in favor of the defendant in the judgment of the Court below on this ground. Now, it is somewhat singular that it has not been decided up to the present day whether, when two letters cross each other in the course of post, the one amounting in terms to an acceptance of the terms offered in the other, such letters amount to a contract. From what I have heard in argument, upon the best consideration I have been able to give to

this case, I am of opinion that they do not. Numberless inconveniences might be the result of our holding that they do. A letter may be put into the post or may be sent out by a private messenger, and then the writer may repent of what he has written, and may dispatch a telegram or send a special messenger on horseback, saying, "I have posted or sent to you a letter making you a certain offer, I cannot fulfil it, consider it cancelled." This second message or telegram may arrive before the letter itself, which may have been miscarried, and yet in a few days or a week, the parties having meanwhile considered that there was no contract, the letter might come to hand. Is it then to become a contract? A great many other cases might be put, but as far as my opinion goes upon a question which has not been decided, in construing the contract, there must be an offer which the person accepting has had an opportunity of considering, and which when he accepts he knows will form a binding contract. Unless that is done, where each of them is, so to speak, making an offer or a cross offer, they are, so to speak, *in fieri*, and do not constitute a contract. Another question which was discussed in the Court below is, whether the plaintiff's letter of November 28th is an unqualified acceptance? That is a very doubtful question. I am rather inclined to the opinion expressed by my brother Channell, that it is not an unqualified acceptance. With regard to the letter of November 24th, to my mind that is out of the question, excepting as a statement of the probable terms; and the plaintiff's letter of the 28th, I think, points to this, "You can enter me 800 tons *on the terms and conditions named in your favor of the 24th inst.*, but I trust you will enter the other 400, making in all 1200 tons at 68s." In substance this letter is, "You are really too hard upon me. I hereby give you so much for the 800 tons, but you must put the other 400 tons a little lower." It is a bating down rather than an absolute acceptance of a contract. But the ground on which I express my opinion that the Court below was right is, that the defendant's letter of November 28th is in fact an answer to the plaintiff's letter of the 27th; that letter must be taken as a whole, and that letter contemplated a sale of 1200 tons, that is not accepted, therefore the judgment of the Court below is right.

BRETT, J. The question is, whether upon a true construction of this correspondence, there is a binding contract between the plaintiff and the defendants for the 800 tons of iron at 69s. It is argued on the one side that such a contract is disclosed because it is said that the defendants' letter of November 24th is an offer for the sale of 800 tons of iron, and this letter of

November 28th leaves open the time for accepting that offer of November 24th, and makes a new offer with regard to another 400 tons ; and that the defendants' offer of November 24th being thus opened by their letter of the 28th, the plaintiff's letter of the 28th is an acceptance of the defendants' offer of the 24th. On the other side it is argued that the defendants' letter of November 28th is not an opening of their offer of the 24th, but that it is an offer with regard to 1200 tons ; and that even if it were a separate offer with regard to 800 tons and 400 tons, still that the true view of the matter is not that it reopens the letter of the 24th, but that it makes a new offer with regard to the 800 tons, and another separate offer, with regard to 400 tons ; and that, upon such a view, the renewed offer with regard to 800 tons is not accepted, because the letter of the plaintiff of November 28th was not in answer to that offer, but was a letter crossing it. Now with regard to the construction of the defendant's letter of November 28th, it seems to me that we must consider that the defendant's letter of November 24th is in answer to a request of the plaintiffs of November 22d for an offer with regard to 800 tons, and is therefore an offer by them with regard to 800 tons. That offer left it open to the plaintiff to accept it within a period which is to be computed by the return of post. I agree that the words, "Your reply by return of post" fixes the time for acceptance, and not the manner of accepting. But that time elapsed ; there was no acceptance within the limited time. So far from there being an acceptance, it seems to me that the plaintiff's letter of November 27th rejects that offer ; it rejects it on the ground that the price is higher than the plaintiff is willing to give. That offer is, therefore, not accepted within the limited time, but is rejected, and it seems to me is at once dead. The letter of the 27th then asks for an offer with respect to 1200 tons, and the letter of November 28th is a letter written "In reply to your favor of yesterday," that is, In reply to your request for an offer with regard to 1200 tons. "I now make you this offer." That seems to me to show that the letter of November 28th of the defendants is an offer with regard to 1200 tons, and not with regard to 800 tons and 400 tons separately. The way in which the offer with regard to the 1200 tons is made is this. "With regard to the first 800 of them, I make you a new offer upon the same terms as I made in the former offer on the 24th. With regard to the remaining 400 tons. I offer you to deliver them at the same price, but at different periods of delivery." I think that the defendants' letter of November 28th, being a letter in answer to a request with regard to 1200 tons, is an offer with regard to 1200

tons, and that no such offer was ever accepted ; but even if it could be taken that it was a separate offer with regard to 800 tons and 400 tons, I cannot accede to the view that it *reopened* the offer of November 24th. That offer was dead, and was no longer binding upon the defendants at all, and therefore it seems to me to be a wrong phrase to say that it *reopened* the offer of November 24th. The only legal way of construing it is to say that it is a new offer with regard to 800 tons. If it were a separate offer, which I should think it was not, it then would be a new offer with regard to 800 tons, and a separate offer with regard to 400 tons, but, even if it were so, I should think that the new offer with regard to the 800 tons had never been accepted, so as to make a binding contract. The new offer would not, in my opinion, be accepted, by the fact of the plaintiff's letter of November 28th crossing it. If the defendants' letter of November 28th is a new offer of the 800 tons, that could not be accepted by the plaintiff until it came to his knowledge, and his letter of November 28th could only be considered as a cross offer. Put it thus : If I write to a person and say, "If you can give me £6000 for my house, I will sell it you," and on the same day, and before that letter reaches him, he writes to me, saying, "If you will sell me your house for £6000 I will buy it," that would be two offers crossing each other, and cross offers are not an acceptance of each other, therefore there will be no offer of either party accepted by the other. That is the case where the contract is to be made by the letters, and by the letters only. I think it would be different if there were already a contract in fact made in words, and then the parties were to write letters to each other, which crossed in the post, those might make a very good memorandum of the contract already made, unless the Statute of Frauds intervened. But where the contract is to be made by the letters themselves, you cannot make it by cross offers, and say that the contract was made by one party accepting the offer which was made to him. It seems to me, therefore, in both views, that the judgment of the Court below was right.

KEATING, J. I also think that the judge of the Court below was right. It seems to me that the transaction disclosed by these letters amounts to this : On November 22d, the plaintiff says, quote me a price for 800 tons, deliverable in March, April, May, and June. The defendant gave a price upon those terms at 69s. for 800 tons, acceptable by return ; it was not accepted, but rejected, and up to that point we are all agreed, both in the Court below and in the Court above, that there is no contract. The plaintiff then says, I will not take the 800 tons at that

price ; will you give it me cheaper if I give you an order for a larger quantity ? Quote me a price for 1200 tons. Now that is a separate and distinct requirement from that made in his letter of November 22d, it is a requirement relating to another and a different quantity of 1200 tons. It is argued, as I understand, by those who hold the opinion that the judgment below was wrong, that the answer does not apply to the entire quantity, as to which the question is put, but it applies to two quantities, one of 800 tons and another of 400 tons, and that it is so because undoubtedly the letter of November 28th does refer to those two quantities. There is a very good reason why it should do so, because the defendant, being asked to quote a price for another and different quantity—namely, 1200 tons—says, “ I quote you a price of 69s. for the 1200 tons, but I cannot deliver them in those four months, because as to the 400 tons I must deliver them in January and February.” What there is to create any confusion in that, I am quite unable to conceive. It is not the less an offer of the 1200 tons, because they say, as to the 400 tons, “ we propose to deliver them in two other months.” They conclude, “ Let us have your reply by return of post, as to whether you accept our *offers*.” Stress is laid upon that word ; in one sense they were “ *offers*,” because there were to be two deliveries, but they get rid of any difficulty on that score, because they go on to say, “ our offers of *together* 1200 tons.” I am unable to read that letter as being anything except an offer in answer to the requirement of the plaintiff as to the 1200 tons, and not as to any less quantity. That renders it entirely unnecessary to consider the other question as to whether the letter of the plaintiff, crossing that letter of the defendants of the 28th, alters the effect of the last-mentioned letter ; but if it were necessary to consider how far a crossing letter would alter the state of things, and whether the two letters crossing would constitute a contract, my present impression is unquestionably in accordance with the opinion expressed by my brother Brett ; but I do not think it necessary to do more than to guard simply against being supposed to agree in the opinions expressed by my brothers Honyman and Quain upon that point, my present impression being the other way, and in accordance with the opinion expressed by my brother Brett. Therefore, upon the whole, I think that the judgment below should be affirmed.

BLACKBURN, J. I also think that the judgment should be affirmed. The question turns upon the true construction of the defendant's letter of November 28th, and that must be taken with the other letter to which it is an answer. The letter of the

24th is an offer of 800 tons. No reply was sent by return, and, that offer being one which required an answer by return of post, I agree with my brother Brett that it was gone as soon as there was no reply by return. It was perfectly competent to the defendants to renew it. Then, on November 27th, the plaintiff writes a letter, saying, "The price you ask is high," so that not only was that out of time, for November 25th was the day the answer was to have been sent, but it was not an acceptance of the offer, it was a refusal, "The price you ask is high," and he goes on, "If I made the quantity 1200 tons," delivery so and so, "I suppose you would make the price lower. Your reply by return will oblige." That is a request on the part of plaintiff, "If I will make the order larger, will you make the price lower?" To that came in answer the defendants' letter of November 28th, which has been read several times, and which I need not read over again. I think, taking the two letters together, the one in answer to the other, we can see what they mean. If, in answer to that letter of November 28th, written by the defendants to the plaintiff, in which they ask for an answer by return of post, there had been a letter sent saying, "I will accept the 800 tons and not take the 400 tons," and that had been relied upon as a binding contract, and the defendants had resisted that, and said: "We did not offer you 800 tons, we offered you 1200 tons if you would take them, but not 1200 tons that you might split into two quantities, taking the 800 and rejecting the 400 tons," the question would have been raised whether this letter of the defendants, of November 28th, read as it must be read, with the plaintiff's letter of the 27th, was an offer of that sort which my brothers Honyman and Quain think it was, or whether it was, as the majority of the Court have already said, an offer of 1200 tons, and 1200 tons only? I am of opinion that it was an offer of the 1200 tons, and the 1200 tons only. I do not think it necessary to repeat what has been said already, but that is a sufficient reason, and that is the only reason, as I understand, stated in the Court of Exchequer as a ground for their judgment, and that is the point upon which that judgment turns. But then there arises another question; on that same November 28th the plaintiff, before he received or knew of the defendants' letter of November 28th, had written a letter which I read to be an offer on his part, "I will take 800 tons, at the price of 69s." That letter crossed the letter of the defendants, and I think my brothers Honyman and Quain, necessarily, as part of their judgment, are of opinion, that that offer, crossing the other offer, and being *ad idem*, according to their construction of the first contract, did make a

binding engagement between the parties. It is not necessary in the present case for the Court of Exchequer Chamber to decide that point, and therefore what I am now going to say is not to be considered at all as part of the judgment of the court of error, but as my own individual opinion. When a contract is made between two parties, there is a promise by one, in consideration of the promise made by the other; there are two assenting minds, the parties agreeing in opinion, and one having promised in consideration of the promise of the other—there is an exchange of promises; but I do not think exchanging offers would, upon principle, be at all the same thing. There is, I believe, a total absence of authority on the point. I do not think, though I am not sure, that the question has ever been raised before. The promise or offer being made on each side in ignorance of the promise or the offer made on the other side, neither of them can be construed as an acceptance of the other. Either of the parties may write and say, "I accept your offer, and, as you perceive, I have already made a similar offer to you," and then people would know what they were about, I think either side might revoke. Such grave inconvenience would arise in mercantile business if people could doubt whether there was an acceptance or not, that it is desirable to keep to the rule that an offer that has been made should be accepted by an acceptance such as would leave no doubt on the matter. I am not aware, as I said before, that any point of this sort has ever been raised before, and consequently this must not be considered as the judgment of the majority of the Exchequer Chamber.

QUAIN, J. My brother Blackburn mistook me with regard to the letter of November 28th. I treat the plaintiff's letter of November 28th as an answer to the defendant's letter of November 24th. I go by the express terms of the letter.

BLACKBURN, J. I certainly misunderstood my brother Quain, and I am sorry for it. It seems to me that the offer of November 24th had been already rejected by the plaintiff, and had expired for six or seven days, and I cannot see how it could be revived again by the plaintiff writing another letter.

Judgment of the majority of the Court below affirmed.

NEWCOMB AND ANOTHER v. DE ROOS.

IN THE QUEEN'S BENCH, NOVEMBER 5, 1859.

[Reported in 2 Ellis & Ellis 271.]

B. C. ROBINSON moved for a prohibition to the Judge of the County Court of Stamford, to restrain further proceedings in a plaint issued from that Court by the plaintiffs against the defendant.

It appeared from the affidavit that the plaintiffs, who were stationers residing and carrying on business at Stamford, had sued the defendant, who was a vendor of patent medicines in Berners Street, London, to recover £3 4s. 10d. balance of account for advertisements inserted by the plaintiffs in certain newspapers, on the defendant's order. The arrangement between the plaintiffs and the defendant had been that certain advertisements were to be inserted by the plaintiffs for the defendant, for which the plaintiffs were to receive payment in goods, and which goods were delivered by the defendant in London to the plaintiffs' order. All orders given by the defendant, or on his behalf, to the plaintiffs for the insertion of advertisements, and all communications relating to the transactions between the plaintiffs and the defendant, were written in London, and transmitted through the post thence to Stamford. The defendant did not reside or carry on business within the jurisdiction of the Stamford County Court. In the particulars of demand the defendant was debited with £21 3s. 7d., for various advertisements, and with £1 10s. for "cash," and £2 1s. 11d. for "returns;" and was credited with the amount of the goods received by the plaintiffs "on sale or return."

B. C. Robinson, for the defendant. Stat. 9 & 10 Vict. ch. 95, § 60 enacts that the summons in a County Court plaint "may issue in any district in which the defendant" "shall dwell or carry on his business at the time of the action brought; or, by leave of the Court for the district in which the defendant" "shall have dwelt or carried on his business, at some time within six calendar months next before the time of the action brought, or in which the cause of action arose, such summons may issue in either of such last-mentioned Courts." And, by Stat. 19 & 20 Vict. ch. 108, § 15, "The registrar of any County Court may issue a summons against any defendant residing out of the jurisdiction of such Court, at any time, upon the application of any plaintiff who will depose before such registrar that his cause of action has arisen within the jurisdiction of

such Court, in like manner as any judge of any County Court has now power to issue any such summons." The summons, in the present case, was issued on the assumption that the cause of action arose within the district of the Stamford County Court. But "the cause of action" means the whole cause of action; *Re Fuller*,¹ *Borthwick v. Walton*,² *Jackson v. Beaumont*.³ Here, the whole cause of action did not arise within the district of the Court from which the summons issued. The order, which was part of the contract, was given out of the district, though the work was done within it, as in *Borthwick v. Walton*.⁴ [Wightman, J. The order was received at Stamford, and it was no contract, or part of a contract, until received and accepted.] The *causa causans* was the writing the letter giving the order. The defendant had no further control over the letter after he had posted it. [Cockburn, C.J. That is only in consequence of the regulations of the Post-Office. The defendant could write again, before the receipt and acceptance of the order, and revoke it.] In *Rex v. Burdett*⁵ it was held by the majority of the Court that a delivery at a post-office, in one county, of a letter, containing a libel, directed to and received by a person in another county, was a publication of the libel in the first county. To put an extreme case: Suppose that the plaintiffs and the defendant were standing on different sides of the boundary line of the Stamford district, and that the order was then verbally given by the defendant, and accepted by the plaintiffs; surely part of the contract would arise without the district. Further, the plaintiffs' particulars do not show where the cause of action with respect to the two items of "cash" and "returns" arose. [Cockburn, C.J. If, on the trial, the plaintiffs did not prove that the cause of action with respect to those items arose within the district, those items would of course be disallowed. Hill, J. You are asking us to review the decision of the registrar.] He has no discretion; he must issue the summons if, according to the language of the forty-first rule of practice of the County Courts, "he is satisfied" that the cause of action arose within the district. [Cockburn, C.J. You are bound to show us that he was satisfied upon insufficient grounds.]

COCKBURN, C.J. I am of opinion that there should be no rule. Admitting that, to enable the registrar to issue a summons to a defendant residing beyond the district, the *whole* cause of action must have arisen within that district, I think that, here, the whole cause of action did arise within the dis-

¹ 2 E. & B. 573.² 15 Com. B. 501.³ 11 Exch. 300.⁴ 15 Com. B. 501.⁵ 4 B. & Ald. 95.

trict of the Stamford County Court. The cause of action is work done by the plaintiffs at the request of the defendant. The request of the defendant was made in London, by letter ; but it was not such a request as created a contract until it was received and accepted by the plaintiffs, and that took place at Stamford, where also the work was done. The whole cause of action, therefore, both the work and the contract under which it was performed, arose at Stamford.

WIGHTMAN, J., concurred.

HILL, J. I accept the test proposed by the defendant's counsel. Suppose the two parties stood on different sides of the boundary line of the district, and that the order was then verbally given and accepted. The contract would be made in the district in which the order was accepted. Here the order was accepted in the district of the Stamford County Court, and the work was done within that district. The whole cause of action, therefore, arose within that district.

BLACKBURN, J., was absent.

Rule refused.

TAYLOR v. JONES.

IN THE HIGH COURT OF JUSTICE, COMMON PLEAS DIVISION,
NOVEMBER 30, 1875.

[*Reported in Law Reports, 1 Common Pleas Division 87.*]

THE plaintiff sued the defendant in the Mayor's Court, London, for £11 4s. for goods sold and delivered under the following circumstances : The defendant, who was an importer and manufacturer of sewing-machines carrying on business in Bury Street, St. Mary Axe, in the city of London (which is within the jurisdiction of the Mayor's Court), on April 3d last, wrote and sent by the post a letter addressed to the plaintiff, who is a wholesale perfumer carrying on business in Red Cross Street, Southwark, in the county of Surrey, containing an order for a quantity of Brown Windsor Soap ; the plaintiff did not answer this letter, but on the 14th he executed the order by sending his servant with the goods to the defendant at Bury Street, St. Mary Axe, where the defendant accepted them.

On August 17th, the defendant, upon an affidavit that the whole cause of action did not arise within the city of London, obtained a writ of prohibition out of the petty-bag office of the High Court of Chancery, under 12 & 13 Vict. ch. 109, § 39 ; and on November 13th the plaintiff obtained an order of

Lush, J., to set aside the prohibition, on the ground that the order for the goods and the delivery both took place within the jurisdiction of the Mayor's Court.

Lumley Smith moved to set aside the order of Lush, J., and for the issue of a prohibition out of this Court.

E. Clark, contra.

LORD COLERIDGE, C.J. I am of opinion that my brother Lush was quite right, and that the present case falls within the authorities recently discussed and considered in this Court. The order for the goods was given by the buyer in the city, by means of a letter posted there addressed to the seller who resided in Southwark. There was no letter accepting the order, but the transaction was completed by the seller sending his servant with the goods and delivering them to the buyer at his place of business within the city. I say the order was given in the city, because I see no distinction in principle (and there is none in any of the authorities) between the case of a letter accepting an offer and a letter containing an order for goods. The language of Lord Justice Mellish in *Harris's Case*¹ shows that in his mind there is no such distinction. The order, then, having been given in the city where the letter conveying it was posted, the contract was complete when the goods were delivered by the seller to the buyer in the city. No part of the cause of action, therefore, arose out of the jurisdiction of the Mayor's Court. *Dunlop v. Higgins*,² in the House of Lords, binds us all. The decision of this Court in *Duncan v. Topham*,³ and that of Lord Ellenborough and the Court of Queen's Bench in *Adams v. Lindsell*,⁴ were there reviewed and the principle adopted. And that judgment covers to the full the ground upon which we are proceeding.

ARCHIBALD, J. I am of the same opinion. The order was given in the city to a person residing out of the city, and the goods were delivered to the defendant within the city. *Dunlop v. Higgins*⁵ decides that a letter containing an offer speaks from the time when and the place where it is posted. It was upon that principle that the recent case of *Evans v. Nicholson*⁶

¹ Law Rep. 7 Ch. 587.

² 8 C. B. 225.

³ 1 H. L. C. 381.

⁴ 1 H. L. C. 381.

⁵ 1 B. & Ald. 681.

⁶ The following is the report of *Evans v. Nicholson* :

This was a case in which a writ of prohibition was moved for to the Mayor's Court, in an action which had proceeded to verdict in favor of the plaintiff, on the ground that the whole cause of action did not arise within the city.

A rule *nisi* was on a former day obtained by Yeatman, against which Tennant now showed cause.

The facts were that the defendant had gone to the plaintiff's shop in the

was determined in this Court. Here there was a complete order when the buyer posted the letter ordering the goods ; and the acceptance of it was the sending the goods into the city and there delivering them to the buyer. My brother Lush was quite right in setting aside the writ of prohibition.

city, selected some goods and ordered others to be made for him, and had directed that all should be sent to him by a carrier whom he named. The defendant resided out of the city, and the carrier in question also carried on his business outside the jurisdiction, and there received the goods from the plaintiff, and delivered them in due course at the defendant's residence.

In December, 1874, the plaintiff sent his account by post, and the defendant acknowledged its receipt, regretting that he could not then send a remittance.

On February 8th, 1875, the plaintiff, by letter, requested immediate payment of the account, and the defendant wrote the following answer, which, posted out of the city, was duly received by the plaintiff at his shop in Cheapside :

" Captain Nicholson is in receipt of Messrs. Benetfink & Co.'s account and notice of the 8th inst., respecting the amount due, £14 10s. 3d., and regrets that at this moment he is much pressed, but will use every endeavor to remit them, if not by the 15th, as requested, as soon after as possible."

The following judgments were delivered :

LINDLEY, J. I am of opinion that this rule should be discharged. The substantial question was, whether the cause of action arose within the limits of the city, so as to give the Lord Mayor's Court jurisdiction to try it. The facts were, that a claim was made by the plaintiff on the defendant in the suit for goods sold and delivered in the city, but, though the goods were ordered and selected there, yet all of them were by the plaintiff delivered to a carrier named by the defendant, that carrier being one who carries on his business outside the city, and the goods being in fact delivered to him outside. That being so, it could not be successfully contended that upon that claim all the cause of action arose within the city. If it stopped there I should, therefore, be of opinion that the rule should be made absolute. But it does not ; and with reference to a claim founded upon an account stated, it seems that there is a cause of action within the jurisdiction of the Mayor's Court. Two letters have been read to us—they are written by the defendant to the plaintiff—they were admitted to have been written and posted out of the city, and received in it by course of post. These were in answer to letters written by the plaintiff to the defendant, the latter having been written in, and received out of, the city. First, then, do those letters amount to an account stated or not ? I am clearly of opinion that they do. In answer to a claim, they contain a distinct admission by the defendant that the amount claimed was due. Then comes the question, which is the important one in this case, where and when that account is to be treated as having been stated. Now, on the authority of *Dunlop v. Higgins, Adams v. Linsdell*, and like cases, we ought to hold that the account was stated at the place where the letter containing the admission was posted, and at the time when it was posted. But then it seems also consistent with *Dunlop v. Higgins*, that such an account is to be considered as a continuing statement of account, and may, therefore, be treated as an account stated at the place where and the time when the letter is received. Thus we have an account

AMPHLETT, B. I am quite of the same opinion. The question is, where was the contract in this case made? The moment

which was first stated out of the city, and then made also again a second time with the plaintiff in the jurisdiction. I see nothing inconsistent with this in *Dunlop v. Higgins*, but rather the reverse, and think the rule must be discharged.

ARCHIBALD, J. I agree entirely with my brother Lindley. The plaintiff based his case on two grounds, the first being upon a claim for goods sold and delivered. But, with reference to that claim, the circumstances showed that part, certainly, of the cause of action took place out of the jurisdiction, and to entitle the Mayor's Court, upon a prohibition being moved to issue to it, to proceed in the action, the whole cause must arise within the city. But he rested his case, also, upon a claim on an account stated. A letter, written by the defendant in such terms as to be an absolute admission of the debt being due, was posted out of the city and received in it. The question is, where is the account stated? Now, as soon as it was put in the post by the defendant there was an account stated as against him, as is decided by the cases of *Dunlop v. Higgins* and *Duncan v. Topham* (*ubi sup.*). But it was a continuing statement, and I see no difference between an acceptance of a contract and a statement of account, so far as the principle is concerned. It is true that in *Dunlop v. Higgins* (*ubi sup.*) it was not necessary for the Court there to consider this point, but it is quite consistent with the judgment on the point decided, that the acceptance was a continuing acceptance. This case of a statement is analogous, I think, to that of an acceptance, for the transaction shapes itself thus: When a letter is written by the creditor, asking the debtor, "Do you owe the sum mentioned in this account?" and the answer is, "Yes," then I think the answer is continuous until it reaches the person to whom it is sent, and is a statement to him then and at the place where he receives it.

DENMAN, J. I agree that the rule in this case cannot be made absolute, on the ground that, in the action for goods sold and delivered, the cause of action happened in the city. But the question is, whether all the material facts necessary to make out the cause of action occurred in the city in respect of the other claim—viz., that on account stated. I should agree with the rest of the Court, that if there were an account stated out of the city, there was, nevertheless, also an account stated in the city, by reason of the continuous statement by the defendant in the letter of February 10th, 1875. That is to my mind ample evidence of an account stated, if it can be made out by the mere production of a document. But, in my opinion, it cannot be made out by the production of a document only, but there must be some evidence that it was stated to some person. I, therefore, holding this view as to what is necessary to be proved, have very considerable doubt if there was here any evidence of an account stated, merely to be derived from the letter posted by the defendant out of the city. But then I must say that in my view an account is stated where the person to whom it is addressed receives the letter, and this letter was, though written without by the defendant, received within the jurisdiction by the plaintiff. I therefore doubt whether we ought not to say that the whole evidence was evidence of an account stated in the city; and I fail, with great deference, to see the application of cases decided on the acceptance of offers. My reason is, that there it is the final act which makes the contract, and terms having been proposed, a party who posts a letter signifying his assent, then accepts the

the defendant's letter containing the order was put into the post there was a good offer made. If the seller had posted in

contract at the time when he posts his letter. But that has, as it seems to me, a very feeble analogy to cases where there is an account stated upon which an action of *assumpsit* may be brought. Therefore it is that I feel more strongly satisfied that we ought to decide in favor of the plaintiff here, than if I agreed with the rest of the Court in basing my judgment on the same grounds as those upon which they decide. But I do agree that, if the letter speaks at the moment it is posted, it is in the nature of a continuous statement, and speaks also at the moment when it is received. Feeling, however, a doubt whether the application of the rule in *Dunlop v. Higgins* is so wide as it seems to the rest of the Court, and fearing that it might do some injustice if so applied, I have expressed the grounds upon which I base my decision here, and how I agree in saying that the rule should be discharged.

LORD COLERIDGE, C.J. I think this rule should be discharged. I thought it important that separate judgments should be delivered, because, though the judgment is unanimous in effect, I agree in the view taken by my brothers Archibald and Lindley, and assent to the application of *Dunlop v. Higgins*, and the principle contained in that case to the present one. Two points were made, and on both in the result I agree with the rest of the Court. In one contention it was said that goods were bargained and sold, and sold and delivered in the city, and as they were delivered by the plaintiff to a carrier named by the defendant, they were for the purpose of the question of jurisdiction delivered as soon as they were put in a course of delivery in the city, and for this a case in 2 Campb. p. 21 was cited. Lord Ellenborough's authority would be a great one, were the cases similar; but his dictum is not applicable to the facts here, for here the goods were not delivered to the carrier till they were out of the jurisdiction, and the goods were not at defendant's, but at plaintiff's risk till they reached the carrier named by the defendants, and that was outside the jurisdiction. The second point, however, was the one most relied on at the trial, and properly so, and to-day Mr. Tennant upon it argues that the plaintiff is entitled to recover upon a claim on an account stated in the city; and he contends, as he must do, that all the material matters necessary to support the cause of action took place in the jurisdiction. The facts were, that a letter was sent by the plaintiff to the defendant in terms which, though they are not before us, we can gather from the reply. We may take it that it was a request for payment of an account, and that it was posted in the jurisdiction. This is not, however, material, because it is incorporated with and admitted by two letters of the defendant, of which the second is in these terms: "Captain Nicholson is in receipt of Messrs. Benetfink & Co.'s account and notice of the 8th inst. respecting the amount due, £ 14 10s. 3d., and regrets that at this moment he is much pressed, but will use every endeavor to remit them, if not by the 15th, as requested, as soon after as possible. Copthorne, February 10th, 1875." Now, it is admitted that this letter was posted out of the jurisdiction, but it is equally clear that it was received by the plaintiff in it; and the question is, whether the statement of the account, which it undoubtedly is, was made out of or in the jurisdiction, or both. According to the old form of pleading, the count was always, "Whereas the defendant accounted with the plaintiff, and upon such accounting the defendant was found in arrear, etc., whereupon the defendant promised to pay on re-

Surrey a letter accepting the offer, I should have thought that the contract was made at the place where the offer was accepted. But there was no letter; the goods were delivered in the city.

quest." This latter part was a matter of form, and has been dropped from the declaration, but it shows what was the condition precedent to maintaining the action—viz., the promise implied in the statement of the account. I find in the books it is stated, from the words of Lord Abinger in *Irving v. Veitch* (3 M. & W. 107): "An account stated is an admission of a balance due from one party to another, and the count lies upon an absolute acknowledgment made by the defendant to the plaintiff of a debt due by him to the plaintiff and payable at the time of action brought." I apprehend that an action could be brought from the moment when the absolute acknowledgment by the defendant was capable of proof, and that moment was in this case when he wrote the letter and posted it. That seems to follow directly, from the cases that have been referred to, and, therefore, upon the authority of those cases, I am of opinion that here there was evidence of an account stated sufficient to support an action, if brought from the moment when the letter was posted. I cannot for myself distinguish the principle of the arising of a cause of action from the acceptance of a contract, and it was decided in *Dunlop v. Higgins* (*ubi sup.*), that the acceptance is complete from the moment when the acceptor writes the words, "accepting the terms of the contract." It has been pointed out, indeed, and with perfect truth, that the cases referred to have stopped at this point with laying down as law that a contract is complete when its terms are accepted, and that the acceptor need not wait till the other party receives his letter notifying his acceptance. But, then, that was all that it was necessary to decide in all those cases—*Adams v. Lindsell*, *Duncan v. Topham*, and *The Imperial Land Company of Marseilles* (Harris's case) (L. Rep. 7 Ch. App. 587); and the courts there needed not to go on and say whether the acceptance was a continuous act; still, all the reasoning in the cases upon which the judgments are founded, though the judgments themselves are confined to the points necessary to be decided, is applicable to the further proposition which we are now considering—viz., that the acceptance continues to be an act done by the person accepting in a uniform and unbroken course of dealing until it reaches the other person to whom it is notified. And in my opinion, although complete when he sends it off by post and made then as against him, it is none the less made also when it reaches the mind of the offerer by reason of its having also been made before. This leads me to be unable to distinguish an acceptance so explained from a statement of an account; and so, to apply the proposition to the facts in this case, I should say that, although an account was undoubtedly stated at Copthorne, wherever that may be, it was none the less stated again when the letter containing the admission was received in the city. Something was said in argument about *Edmunds v. Downes* (*ubi sup.*), to suggest that this, being a conditional promise to pay, would not support the count as if it were an absolute acknowledgment of the debt; but that case was not decided on this point, but merely as to whether certain words used in a letter were or were not a conditional promise; and the whole of the Court agrees here that when a man says he has received an account of an amount due, specifying the sum, that must be taken to be the amount due by his admission, and that it is an admission in the highest possible terms. On all these grounds, I think the rule must be discharged, and the majority of the Court, in discharging the

Every part of the cause of action, therefore, arose within the city.

Rule refused with costs.¹

COWAN *v.* O'CONNOR.

IN THE SUPREME COURT OF JUDICATURE, QUEEN'S BENCH
DIVISION, MARCH 22, 1888.

[*Reported in Law Reports, 20 Queen's Bench Division 640.*]

APPLICATION referred from chambers for a writ of prohibition to the corporation of London and to the plaintiff in an action in the Mayor's Court.

The declaration in the action alleged that the defendant, acting for and on behalf of the plaintiff and as his agent in wagering on certain horse races, received to the use of the plaintiff £356, and the plaintiff claimed the said sum on an account stated.

It appeared from affidavits that the plaintiff telegraphed from rule, base their judgment on the authority of the great cases which I am unable to distinguish in principle from the present.

Rule discharged.

C. Mossoff for the plaintiff.

C. B. Hallward for the defendant.—ED.

¹ Action in the Mayor's Court for the price of goods sold.

It appeared by the plaintiff's affidavit that part of the goods were ordered by a letter, written and posted by the defendant in Liverpool, and received by the plaintiff in London, where he resided and carried on business.

The defendant having obtained a rule for a prohibition.

Edwyn Jones showed cause.

Thrupp in support of the rule.

DENMAN, J. In my judgment *Evans v. Nicholson (ubi sup.)* disposes of the present question. That was a case in which the Court of Common Pleas held that a letter posted in the country, though it might have been held to speak when it was posted, did, nevertheless, also amount to a continuous statement of account at the place where it was received. That seems to me to decide the present case. Then it is argued that *Taylor v. Jones (ubi sup.)* is a decision the other way. It must be remembered, however, that *Evans v. Nicholson* was cited in that very case, and the court intimated that they did not intend to overrule it. Nor was it necessary to do so, because they did not hold that the letter did not speak in the place where it was received, but only that it did speak in the place where it was posted. To say that the letter completed the cause of action in the place where the sender posted it is a very different thing from saying that, if a question had arisen as to the effect of the writing where it was received, the decision of the Court would have been opposed to that in *Evans v. Nicholson*. I think we are bound by that case, and that part of the cause of action

a post-office in Regent Street, outside the city, to the defendant at Ludgate Circus, within the city, directions to put certain sums of money as bets on certain racehorses, and gave an address at the Pall Mall Club, without the city. The defendant replied by telegram from Ludgate Circus to the plaintiff at the club, "You are on." The defendant alleged in his affidavit that he did not make any bet with any other person in consequence of the telegrams on behalf of the plaintiff, and that he had not received any money in respect of any bets made on behalf of the plaintiff or in consequence of the telegrams.

Danckwerts for the defendant.

Francis Watt for the plaintiff.

MANISTY, J. This is an application for a prohibition to the Lord Mayor's Court in a cause where the amount sued for exceeds £50, and therefore the whole cause of action must arise within the jurisdiction of the city. The order by the plaintiff to the defendant was sent by telegram, and to my mind that is exactly the same as if it was a letter sent through the post-office, and until that reached the defendant he had no authority. He received this telegraphic communication in the city, and answered it in the city. It is said that there is a fact outside the city to be proved—viz., the authority of the telegraph office to send this telegram. This is not the case. All that need be done is to prove the receipt by the defendant of the order from the plaintiff directly, and the answer directly. I am clearly of opinion that in the present case there is no necessity to prove that the post-office had authority to send the telegram; it was merely a medium of communication between the parties, who are in the same position as if they met together and made a contract. There is nothing to justify us in granting a prohibition.

HAWKINS, J. I am of the same opinion. It is said that the Lord Mayor's Court has no jurisdiction because the telegram in the present case must be held to have arisen within the city of London. The rule therefore must be discharged.

LINDLEY, J. I am of the same opinion. I do not see any inconsistency between the two cases that have been cited. It seems to me to have been properly decided that a letter posted in one place and received in another has a continuous effect, and speaks in the place where it is received. That view is not only consistent with *Evans v. Nicholson*, but was adopted and approved by the Court for the Consideration of Crown Cases Reserved in *Reg v. Rogers (ubi sup.)*. I think the true construction of both cases is, that a letter is a continuing offer, or order, or statement by the sender, which takes effect in the place where the person to whom it is sent receives it. The rule must be discharged.

Rule discharged with costs.—*Bennett v. Cosgriff*, 38 Law Times Reports, New Series, 177.—ED.

by which the directions to the defendant were given was dispatched from Regent Street, although delivered in the city, and therefore that part of the cause of action arose out of the city. I am not of that opinion. I think that where, as here, a person opens a correspondence and initiates a transaction by telegram he must be treated as though he were, through it, speaking to the person to whom such telegram is directed, at the place to which he directs it to be sent, and where he intends it to be delivered ; and if he desires a reply by telegram, such reply must be considered as given to him at the telegraph office from whence such reply is dispatched. A contract was created by two telegrams in the present case, and I am clearly of opinion that it was a contract in the city. But it is said that the authority to the telegraph clerk to communicate the telegram was an authority given in Regent Street. That may be. But it is perfectly certain that the authority given in Regent Street was an authority to do something—namely, deliver the message, in the city, and nowhere else. The authority to transmit the message, when established, is merely evidence which goes to fix the sender with the responsibility of sending it ; but it is no part of the cause of action. If this objection were to prevail, no manufacturer in the country who sends his traveller to receive orders in the city to supply goods could sue in the Mayor's Court for the price, although the contract was made by the traveller and the goods delivered in the city. We have nothing to do with the question whether the contract was that alleged, which, when the case goes to trial it will be for the tribunal before which it is to be tried to decide. Then it is said there is another element of consideration—viz., the receipt of the money. Of course, the plaintiff will have to prove that it was received, or he will fail on the merits.

Application refused.

PAUL FELTHOUSE *v.* BINDLEY.

IN THE COURT OF COMMON PLEAS, JULY 8, 1862.

[*Reported in 11 Common Bench, New Series, 868.*]

THIS was an action for the conversion of a horse. Pleas, not guilty, and not possessed.

The cause was tried before Keating, J., at the last Summer Assizes at Stafford, when the following facts appeared in evidence : The plaintiff was a builder residing in London. The defendant was an auctioneer residing at Tamworth. Toward the close of the year 1860 John Felthouse, a nephew of the

plaintiff, being about to sell his farming stock by auction, a conversation took place between the uncle and nephew respecting the purchase by the former of a horse of the latter; and, on January 1st, 1861, John Felthouse wrote to his uncle as follows :

“ BANGLEY, January 1, 1861.

“ DEAR SIR : I saw my father on Saturday. He told me that you considered you had bought the horse for £30. If so, you are laboring under a mistake, for 30 *guineas* was the price I put upon him, and you never heard me say less. When you said you would have him, I considered you were aware of the price, as I would not take less.

JOHN FELTHOUSE.”

The plaintiff on the following day replied as follows :

“ LONDON, January 2, 1862.

“ DEAR NEPHEW : Your price, I admit, was 30 guineas. I offered £30—never offered more, and you said the horse was mine. However, as there may be a mistake about him, I will split the difference—£30 15s.—I paying all expenses from Tamworth. You can send him at your convenience, between now and March 25th. If I hear no more about him, I consider the horse mine at £30 15s.

PAUL FELTHOUSE.”

To this letter the nephew sent no reply, and on February 25th the sale took place, the horse in question being sold with the rest of the stock, and fetching £33, which sum was handed over to John Felthouse. On the following day the defendant (the auctioneer), being apprised of the mistake, wrote to the plaintiff as follows :

“ TAMWORTH, February 26, 1861.

“ DEAR SIR : I am sorry I am obliged to acknowledge myself forgetful in the matter of one of Mr. John Felthouse's horses. Instructions were given me to reserve the horse, but the lapse of time, and a multiplicity of business pressing upon me, caused me to forget my previous promise. I hope you will not experience any great inconvenience. I will do all I can to get the horse again, but shall know on Saturday if I have succeeded.

“ WILLIAM BINDLEY.”

On February 27th John Felthouse wrote to the plaintiff as follows :

“ BANGLEY, February 27, 1861.

“ MY DEAR UNCLE : My sale took place on Monday last, and we were very much annoyed in one instance. When Mr. Bindley came over to take an inventory of the stock, I said that

horse (meaning the one I sold to you) is sold. Mr. B. said it would be better to put it in the sale, and he would buy it in without any charge. Father stood by while he was running it up, but had no idea but he was doing it for the good of the sale, and according to his previous arrangement, until he heard him call out Mr. Glover. He then went to Mr. B. and said that horse was not to be sold. He exclaimed he had quite forgotten, but would see Mr. Glover and try to recover it, and says he will give £5 to the gentleman if he will give it up; but we fear it doubtful. I have kept one horse for my own accommodation while we remain at Bangle, and if you like to have it for a few months, say five or six, you are welcome to it, free of any charge, except the expenses of travelling, and if at the end of that time you like to return him, you can, or you can keep him and let me know what you think he is worth. I am very sorry that such has happened, but hope we shall make matters all right, and would have given £5 rather than that horse should have been given up.

JOHN FELTHOUSE."

On the part of the defendant it was submitted that the letter of February 27th, 1861, was not admissible in evidence. The learned judge, however, overruled the objection. It was then submitted that the property in the horse was not vested in the plaintiff at the time of the sale by the defendant.

A verdict was found for the plaintiff, damages £33, leave being reserved to the defendant to move to enter a nonsuit, if the Court should be of opinion that the objection was well founded.

Dowdeswell, in Michaelmas Term last, accordingly obtained a rule *nisi*.

Powell showed cause.

Montague Smith, Q.C., and *Dowdeswell* in support of the rule.

WILLES, J. I am of opinion that the rule to enter a nonsuit should be made absolute. The horse in question had belonged to the plaintiff's nephew, John Felthouse. In December, 1860, a conversation took place between the plaintiff and his nephew relative to the purchase of the horse by the former. The uncle seems to have thought that he had on that occasion bought the horse for £30, the nephew that he had sold it for 30 guineas, but there was clearly no complete bargain at that time. On January 1st, 1861, the nephew writes: "I saw my father on Saturday. He told me that you considered you had bought the horse for £30. If so, you are laboring under a mistake, for 30 guineas was the price I put upon him, and you never heard me say less. When you said you would have him, I considered

you were aware of the price." To this the uncle replies on the following day : " Your price, I admit, was 30 guineas. I offered £30 ; never offered more, and you said the horse was mine. However, as there may be a mistake about him, I will split the difference. If I hear no more about him, I consider the horse mine at £30 15s." It is clear that there was no complete bargain on January 2d, and it is also clear that the uncle had no right to impose upon the nephew a sale of his horse for £30 15s. unless he chose to comply with the condition of writing to repudiate the offer. The nephew might, no doubt, have bound his uncle to the bargain by writing to him, the uncle might also have retracted his offer at any time before acceptance. It stood an open offer, and so things remained until February 25th, when the nephew was about to sell his farming stock by auction. The horse in question being catalogued with the rest of the stock, the auctioneer (the defendant) was told that it was already sold. It is clear, therefore, that the nephew in his own mind intended his uncle to have the horse at the price which he (the uncle) had named—£30 15s.—but he had not communicated such his intention to his uncle, or done anything to bind himself. Nothing, therefore, had been done to vest the property in the horse in the plaintiff down to February 25th, when the horse was sold by the defendant. It appears to me that, independently of the subsequent letters, there had been no bargain to pass the property in the horse to the plaintiff, and therefore that he had no right to complain of the sale. Then what is the effect of the subsequent correspondence? The letter of the auctioneer amounts to nothing. The more important letter is that of the nephew, of February 27th, which is relied on as showing that he intended to accept and did accept the terms offered by his uncle's letter of January 2d. That letter, however, may be treated either as an acceptance then for the first time made by him, or as a memorandum of a bargain complete before February 25th, sufficient within the Statute of Frauds. It seems to me that the former is the more likely construction, and if so, it is clear that the plaintiff cannot recover. But, assuming that there had been a complete parol bargain before February 25th, and that the letter of the 27th was a mere expression of the terms of that prior bargain, and not a bargain then for the first time concluded, it would be directly contrary to the decision of the Court of Exchequer in *Stockdale v. Dunlop*, 6 M. & W. 224, to hold that that acceptance had relation back to the previous offer so as to bind third persons in respect of a dealing with the property by them in the interim. In that case Messrs. H. & Co., being the owners of two ships, called

the Antelope and the Maria, trading to the coast of Africa, and which were then expected to arrive in Liverpool with cargoes of palm-oil, agreed *verbally* to sell the plaintiffs two hundred tons of oil—one hundred tons to arrive by the Antelope and one hundred tons by the Maria. The Antelope did afterward arrive with one hundred tons of oil on board, which were delivered by H. & Co. to the plaintiffs. The Maria, having fifty tons of oil on board, was lost by perils of the sea. The plaintiffs having insured the oil on board the Maria, together with their expected profits thereon, it was held that they had no insurable interest, as the contract they had entered into with H. & Co., being verbal only, was incapable of being enforced.

BYLES, J. I am of the same opinion, and have nothing to add to what has fallen from my brother Willes.

KEATING, J. I am of the same opinion. Had the question arisen as between the uncle and the nephew, there would probably have been some difficulty. But as between the uncle and the auctioneer, the only question we have to consider is, whether the horse was the property of the plaintiff at the time of the sale on February 25th. It seems to me that nothing had been done at that time to pass the property out of the nephew and vest it in the plaintiff. A proposal had been made, but there had before that day been no acceptance binding the nephew.

Rule absolute.

JOHN G. DAY v. ASA H. CATON.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS,
FEBRUARY 29, 1876.

[*Reported in 119 Massachusetts Reports 513.*]

CONTRACT to recover the value of one half of a brick party wall built by the plaintiff upon and between the adjoining estates, 27 and 29 Greenwich Park, Boston.

At the trial in the Superior Court, before Allen, J., it appeared that, in 1871, the plaintiff, having an equitable interest in lot 29, built the wall in question, placing one half of it on the vacant lot 27, in which the defendant then had an equitable interest. The plaintiff testified that there was an express agreement on the defendant's part to pay him one half the value of the wall when the defendant should use it in building upon lot 27. The defendant denied this, and testified that he never

had any conversation with the plaintiff about the wall ; and there was no other direct testimony on this point.

The defendant requested the judge to rule that, " 1. The plaintiff can recover in this case only upon an express agreement.

" 2. If the jury find there was no express agreement about the wall, but the defendant knew that the plaintiff was building upon land in which the defendant had an equitable interest, the defendant's rights would not be affected by such knowledge, and his silence and subsequent use of the wall would raise no implied promise to pay anything for the wall."

The judge refused so to rule, but instructed the jury as follows : " A promise would not be implied from the fact that the plaintiff, with the defendant's knowledge, built the wall and the defendant used it, but it might be implied from the conduct of the parties. If the jury find that the plaintiff undertook and completed the building of the wall with the expectation that the defendant would pay him for it, and the defendant had reason to know that the plaintiff was so acting with that expectation, and allowed him so to act without objection, then the jury might infer a promise on the part of the defendant to pay the plaintiff."

The jury found for the plaintiff, and the defendant alleged exceptions.

H. D. Hyde & M. F. Dickinson, Jr., for the defendant.

F. W. Kittredge for the plaintiff.

DEVENS, J. The ruling that a promise to pay for the wall would not be implied from the fact that the plaintiff, with the defendant's knowledge, built the wall, and that the defendant used it, was substantially in accordance with the request of the defendant, and is conceded to have been correct. Chit. Con. (11th Am. ed.) 86. *Wells v. Banister*, 4 Mass. 514 ; *Knowlton v. Plantation No. 4*, 14 Maine, 20 ; *Davis v. School District in Bradford*, 24 Maine, 349.

The plaintiff, however, contends that the presiding judge incorrectly ruled that such promise might be inferred from the fact that the plaintiff undertook and completed the building of the wall with the expectation that the defendant would pay him for it, the defendant having reason to know that the plaintiff was acting with that expectation, and allowed him thus to act without objection.

The fact that the plaintiff expected to be paid for the work would certainly not be sufficient of itself to establish the existence of a contract, when the question between the parties was whether one was made. *Taft v. Dickinson*, 6 Allen, 553. It must be shown that, in some manner, the party sought to be

charged assented to it. If a party, however, voluntarily accepts and avails himself of valuable services rendered for his benefit, when he has the option whether to accept or reject them, even if there is no distinct proof that they were rendered by his authority or request, a promise to pay for them may be inferred. His knowledge that they were valuable, and his exercise of the option to avail himself of them, justify this inference. *Abbot v. Hermon*, 7 Greenl. 118; *Hayden v. Madison*, 7 Greenl. 76. And when one stands by in silence and sees valuable services rendered upon his real estate by the erection of a structure (of which he must necessarily avail himself afterward in his proper use thereof), such silence, accompanied with the knowledge on his part that the party rendering the services expects payment therefor, may fairly be treated as evidence of an acceptance of it, and as tending to show an agreement to pay for it.

The maxim, *Qui tacet consentire videtur*, is to be construed indeed as applying only to those cases where the circumstances are such that a party is fairly called upon either to deny or admit his liability. But if silence may be interpreted as assent where a proposition is made to one which he is bound to deny or admit, so also it may be if he is silent in the face of facts which fairly call upon him to speak. *Lamb v. Bunce*, 4 M. & S. 275; *Conner v. Hackley*, 2 Met. 613; *Preston v. American Linen Co. ante*, 400.

If a person saw day after day a laborer at work in his field doing services, which must of necessity inure to his benefit, knowing that the laborer expected pay for his work, when it was perfectly easy to notify him if his services were not wanted, even if a request were not expressly proved, such a request, either previous to or contemporaneous with the performance of the services, might fairly be inferred. But if the fact was merely brought to his attention upon a single occasion and casually, if he had little opportunity to notify the other that he did not desire the work and should not pay for it, or could only do so at the expense of much time and trouble, the same inference might not be made. The circumstances of each case would necessarily determine whether silence with a knowledge that another was doing valuable work for his benefit, and with the expectation of payment, indicated that consent which would give rise to the inference of a contract. The question would be one for the jury, and to them it was properly submitted in the case before us by the presiding judge.

Exceptions overruled.

CHARLES A. HOBBS v. MASSASOIT WHIP COMPANY.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS,

MARCH 1, 1893.

[Reported in 158 Massachusetts Reports 194.]

CONTRACT, upon an account annexed for one hundred and eight dollars and fifty cents, for 2350 eelskins sold by the plaintiff to the defendant. At the trial in the Superior Court, before Hammond, J., it appeared in evidence that the plaintiff lived in Saugus, and the defendant had its usual place of business in Westfield, and was engaged in the manufacture of whips.

The plaintiff testified that he delivered the skins in question to one Harding of Lynn, on February 18th, 1890, who upon the same or the following day forwarded them to the defendant; that the skins were in good condition when received by Harding, 2050 of them being over twenty-seven inches in length each, and the balance over twenty-two inches in length each; that he had forwarded eelskins to the defendant through said Harding several different times in 1888 and 1889, and received payment therefor from the defendant; that he knew the defendant used such skins in its business in the manufacture of whips; that the skins sent on February 18th, 1890, were for such use; that he understood that all skins sent by him were to be in good condition and over twenty-two inches in length, and that the defendant had never ordered of him skins less than twenty-two inches in length; and that Harding took charge of the skins for him and that he received orders through Harding, but that Harding was not his agent.

Harding, who was called as a witness, testified that he had some correspondence for the plaintiff with the defendant in reference to skins; that he acted for the plaintiff in forwarding skins to the defendant, and in receiving pay therefor, and acted for the plaintiff in giving him any information, order, or notice which he received from the defendant in reference to skins sent or to be sent.

The defendant contended that Harding acted as the plaintiff's agent. The plaintiff contended that Harding acted as the agent of the defendant, and not as his agent. On this point the evidence was conflicting, and the question was submitted to the jury, upon instructions not excepted to.

Four letters were offered in evidence, three of which, dated in 1889, showed transactions between the plaintiff and the de-

fendant, and the fourth of which, dated Lynn, February 18th, 1890, signed by Harding and addressed to the defendant, was as follows : " We send you to-day, for Mr. Hobbs, 2050 eelskins at .05 and 300 at .02."

One Pirnie, president of the defendant corporation, called by the defendant, testified that before February 18th, 1890, the plaintiff had sent eelskins four or five times by Harding to the defendant, which were received and paid for by the defendant ; that the defendant agreed to pay five cents each for eelskins over twenty-seven inches in length, and two cents each for eelskins over twenty-two inches in length and less than twenty-seven inches, suitable for use in the defendant's business ; that Harding was not acting for the defendant, but for the plaintiff ; that the defendant never ordered the skins in question, and did not purchase them in any manner, and that no officer or employé of the corporation except himself had authority to order or purchase skins, and that he never ordered or purchased those in question ; that skins came from Hobbs through Harding on February 19th or 20th, 1890, and were at once examined by him, and found to be less than twenty-two inches in length, and found to be unfit for use, and that he notified Harding at once, in writing, that the skins were unfit for use, and that they were held subject to the plaintiff's order ; that the skins remained some months at the defendant's place of business in Westfield, and were then destroyed ; and that the defendant received no other skins in the month of February from the plaintiff or from any other person.

One Case, the defendant's shipping clerk, and one Gowdy, the defendant's treasurer, testified that the skins sent on February 18th, 1890, and received February 19th or 20th, 1890, were examined by them, and were very short, in very bad shape, not fit for use, and worthless.

The judge instructed the jury that the plaintiff could not recover for eelskins less than twenty-two inches in length, nor for any of the eelskins if they were in the condition described by the witnesses for the defendant.

The plaintiff denied that he received any notice from the defendant that the skins were not suitable for use, or that they were held subject to his order.

The judge, among other instructions, also gave the following : " Whether there was any prior contract or not, if skins are sent to them (the defendants) and they see fit, whether they have agreed to take them or not, to lie back and say nothing, having reason to suppose that the man who has sent them believes that they are taking them, since they say nothing about

it, then, if they fail to notify, you would be warranted in finding for the plaintiff, on that state of things."

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

F. L. Evans for the defendant.

J. E. Hanly & J. F. Libby for the plaintiff.

HOLMES, J. This is an action for the price of eelskins sent by the plaintiff to the defendant, and kept by the defendant some months, until they were destroyed. It must be taken that the plaintiff received no notice that the defendants declined to accept the skins. The case comes before us on exceptions to an instruction to the jury, that, whether there was any prior contract or not, if skins are sent to the defendant, and it sees fit, whether it has agreed to take them or not, to lie back, and to say nothing, having reason to suppose that the man who has sent them believes that it is taking them, since it says nothing about it, then, if it fails to notify, the jury would be warranted in finding for the plaintiff.

Standing alone, and unexplained, this proposition might seem to imply that one stranger may impose a duty upon another, and make him a purchaser, in spite of himself, by sending goods to him, unless he will take the trouble, and be at the expense, of notifying the sender that he will not buy. The case was argued for the defendant on that interpretation. But, in view of the evidence, we do not understand that to have been the meaning of the judge, and we do not think that the jury can have understood that to have been his meaning. The plaintiff was not a stranger to the defendant, even if there was no contract between them. He had sent eelskins in the same way four or five times before, and they had been accepted and paid for. On the defendant's testimony, it is fair to assume that, if it had admitted the eelskins to be over twenty-two inches in length, and fit for its business, as the plaintiff testified, and the jury found that they were, it would have accepted them; that this was understood by the plaintiff; and, indeed, that there was a standing offer to him for such skins. In such a condition of things, the plaintiff was warranted in sending the defendant skins conforming to the requirements, and even if the offer was not such that the contract was made as soon as skins corresponding to its terms were sent, sending them did impose on the defendant a duty to act about them; and silence on its part, coupled with a retention of the skins for an unreasonable time, might be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to amount to an acceptance. See *Bushel v. Wheeler*, 15 Q. B. 442; *Benjamin*

on Sales, §§ 162-164 ; Taylor v. Dexter Engine Co., 146 Mass. 613, 615. The proposition stands on the general principle that conduct which imports acceptance or assent is acceptance or assent in the view of the law, whatever may have been the actual state of mind of the party—a principle sometimes lost sight of in the cases. O'Donnell v. Clinton, 145 Mass. 461, 463 ; McCarthy v. Boston & Lowell Railroad, 148 Mass. 550, 552.¹

Exceptions overruled.

¹ "Express contracts are, where the terms of the agreement are openly uttered and avowed at the time of the making : as, to deliver an ox or ten loads of timber, or to pay a stated price for certain goods. Implied are such as reason and justice dictate ; and which, therefore, the law presumes that every man undertakes to perform. As, if I employ a person to do any business for me, or perform any work, the law implies that I undertook and contracted to pay him as much as his labor deserves. If I take up wares of a tradesman without any agreement of price, the law concludes that I contracted to pay their real value."

This is the language of Blackstone, 2 Comm. 443, and it is open to some criticism. There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties, or impose such upon them. All true contracts grow out of the intentions of the parties to transactions, and are dictated only by their mutual and accordant wills. When this intention is expressed, we call the contract an express one. When it is not expressed, it may be inferred, implied, or presumed, from circumstances as really existing, and then the contract, thus ascertained, is called an implied one. The instances given by Blackstone are an illustration of this.

But it appears in another place, 3 Comm. 159-166, that Blackstone introduces this thought about reason and justice dictating contracts, in order to embrace, under his definition of an implied contract, another large class of relations, which involve no intention to contract at all, though they may be treated as if they did. Thus, whenever, not our variant notions of reason and justice, but the common sense and common justice of the country, and therefore the common law or statute law, impose upon any one a duty, irrespective of contract, and allow it to be enforced by a contract remedy, he calls this a case of implied contract. Thus out of torts grows the duty of compensation, and in many cases the tort may be waived, and the action brought in *assumpsit*.

It is quite apparent, therefore, that radically different relations are classified under the same term, and this must often give rise to indistinctness of thought. And this was not at all necessary ; for we have another well-authorized technical term exactly adapted to the office of making the true distinction. The latter class are merely *constructive* contracts, while the former are truly implied ones. In one case the contract is mere fiction, a form imposed in order to adapt the case to a given remedy ; in the other it is a fact legitimately inferred. In one, the intention is disregarded ; in the other, it is ascertained and enforced. In one, the duty defines the contract ; in the other, the contract defines the duty.

We have, therefore, in law three classes of relations called contracts.

1 Constructive contracts, which are fictions of law adapted to enforce

ADAMS AND OTHERS v. LINDSELL AND ANOTHER.

IN THE KING'S BENCH, JUNE 5, 1818.

[Reported in 1 Barnewall & Alderson 681.]

ACTION for non-delivery of wool according to agreement. At the trial at the last Lent assizes for the county of Worcester, before Burrough, J., it appeared that the defendants, who were dealers in wool, at St. Ives, in the county of Huntingdon, had, on Tuesday, September 2d, 1817, written the following letter to the plaintiffs, who were woollen manufacturers residing in Bromsgrove, Worcestershire. "We now offer you eight hundred tods of wether fleeces, of a good fair quality of our country wool, at 35s. 6d. per tod, to be delivered at Leicester, and to be paid for by two months' bill in two months, and to be weighed up by your agent within fourteen days, *receiving your answer in course of post.*"

This letter was misdirected by the defendants, to Bromsgrove, Leicestershire, in consequence of which it was not received by the plaintiffs in Worcestershire till 7 P.M. on Friday, September 5th. On that evening the plaintiffs wrote an answer, agreeing to accept the wool on the terms proposed. The course of the post between St. Ives and Bromsgrove is through London, and consequently this answer was not received by the defendants till Tuesday, September 9th. On Monday, September 8th, the defendants not having, as they expected, received an answer on Sunday, September 7th (which in case their letter had not been misdirected would have been in the usual course of the post), sold the wool in question to another person. Under these circumstances the learned judge held, that the delay having been occasioned by the neglect of the defendants, the jury must take it, that the answer did come back in due course of post; and that then the defendants were liable for the loss that had been sustained, and the plaintiffs accordingly recovered a verdict.

Jervis having in Easter Term obtained a rule *nisi* for a new trial, on the ground that there was no binding contract between the parties.

legal duties by actions of contract, where no proper contract exists, express or implied.

2. Implied contracts, which arise under circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract.

3. Express contracts, already sufficiently distinguished.—Lowrie, J., *Hertzog v. Hertzog*, 29 Pa. St. 465, 467-468.—ED.

Dauncey, Puller & Richardson showed cause. They contended that at the moment of the acceptance of the offer of the defendants by the plaintiffs the former became bound. And that was on the Friday evening, when there had been no change of circumstances. They were then stopped by the Court, who called upon

Jervis & Campbell in support of the rule. They relied on *Payne v. Cave*,¹ and more particularly on *Cooke v. Oxley*.² In that case Oxley, who had proposed to sell goods to Cooke, and given him a certain time at his request, to determine whether he would buy them or not, was held not liable to the performance of the contract, even though Cooke, within the specified time, had determined to buy them, and given Oxley notice to that effect. So here the defendants who have proposed by letter to sell this wool, are not to be held liable, even though it be now admitted that the answer did come back in due course of post. Till the plaintiffs' answer was actually received there could be no binding contract between the parties; and before then the defendants had retracted their offer by selling the wool to other persons. But the Court said that if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them that the plaintiffs' answer was received in course of post.³

Rule discharged.

¹ 3 T. R. 148.

² *Ibid.*, 653.

³ It is further contended that the money letter was not mailed in time for the return mail at 1.30. The request in Skinner's letter was not that the money should be sent by the first return mail, and no one receiving such a letter residing in a city where there were several mails every day, would so understand it. It cannot be supposed that Skinner meant the money should be sent to him by the first return mail or he would not receive it, and then insist upon the forfeiture of the policy. After the receipt of the letter, the assured was entitled to a reasonable time in which to comply, before he could be so put in default as to cause a forfeiture of his policy. Taking into consideration all the circumstances, we think that the money letter was

McCULLOCH v. THE EAGLE INSURANCE COMPANY.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER
TERM, 1820.

[Reported in 1 Pickering 278.]

THIS action, which was *assumpsit*, came before the Court upon a case stated. The material facts were as follows : On December 29th, 1820, the plaintiff, who lived at Kennebunk, in Maine, wrote to the defendants requesting to know on what terms they would insure \$2500 on his brig Hesper and cargo from Martinico to the United States. The defendants on January 1st, 1821, sent an answer, saying they would take the risk at 2½ per cent. This letter was received by the plaintiff on January 3d, on which day he wrote a reply requesting the defendants to fill a policy on the terms proposed by them. The defendants on January 2d wrote again to the plaintiff, declining to take the risk, but the plaintiff had sent his letter of the 3d before he received the last letter of the defendants. All the letters were sent by mail, and were duly received by the parties respectively. The vessel was afterward lost on the voyage.

The only question in the cause was, whether the correspondence of the parties constituted a contract by which the defendants were bound.

Prescott for the plaintiff.

Saltonstall for the defendants.

PARKER, C.J., delivered the opinion of the Court. This action is brought to recover a sum alleged to have been insured by the defendants on the brig Hesper, belonging to the plaintiff, on a voyage from Martinico to her port of discharge, and another sum on her cargo. The usual evidence of such contract, a policy, never having been made, the only question submitted is, whether there was an agreement to insure ; everything else necessary to entitle the plaintiff to recover being agreed by the parties. And it is certain that if a contract was

mailed in time to comply with Skinner's request.*—Earl, J., *Palmer v. Phoenix Mutual Fire Insurance Co.*, 84 N. Y. 69, 71.—ED.

* The request referred to in the above paragraph was in the following language (see 84 N. Y. 69): " You will confer a great favor if you send by return of mail, or by express, the amount of quarterly premium, already past due on your policy of insurance, so that I can make my return to home office. The amount is \$69. Please forward the same, and very much oblige."—ED.



made, the mere want of a policy will not prevent the plaintiff from recovering.

We are to inquire, then, whether the correspondence between the parties, which is submitted to us, does constitute a contract binding upon both parties ; if it does not, whatever might be the expectations of either, it is only an attempt to make a contract, which has failed. The letter from the plaintiff of December 29th contained an inquiry only, as to the rate of premium at which the insurance might be done in the defendants' office, and the plaintiff was entirely at liberty to accept or refuse the terms which were proposed in answer ; even if he had made no reply to the defendants' letter, there would have been neither a breach of contract nor of civility. This answer was written on January 1st, and would reach the post-office in Kennebunk, the place of the plaintiff's residence, on the 3d. It was replied to on the day of the arrival, by an acceptance of the terms and a direction to make out the policy and deliver it to the plaintiff's agent in Boston, who was authorized to give a promissory note for the premium in common form. But on January 2d, before the defendants' letter to the plaintiff could have been received, another letter was written by the defendants, retracting the offer made in the former letter, and signifying a determination not to insure upon that vessel upon any terms. These letters crossed each other upon the road. It is contended by the plaintiff, that the bargain was complete at the moment he wrote and put into the mail his letter signifying his acceptance of the terms offered ; by the defendants, that the treaty was open until they should have received that letter, and that in the mean time they had a right to withdraw their offer. We adopt the latter opinion as the most reasonable. The offer did not bind the plaintiff until it was accepted, and it could not be accepted, to the knowledge of the defendants, until the letter announcing the acceptance was received, or at most until the regular time for its arrival by mail had elapsed. Had the vessel arrived in safety at Kennebunk on the 2d, or on the morning of the 3d, the plaintiff would not have accepted the offer, and was not bound to accept, so that the defendants would not have been entitled to any premium ; and both must be bound, in order to make the contract binding upon either, unless time is given by one to the other, in which case, perhaps, he may be bound, although the other is not ; at least we should think this reasonable in mercantile contracts, though it was decided otherwise in the case of *Cooke v. Oxley*, 3 D. & E. 653. In that case the declaration stated that the defendant proposed to the plaintiff to sell him tobacco at a certain price, and, at the

request of the plaintiff, gave him until 4 o'clock P.M. to consent or disagree to the proposal. The plaintiff averred that he did agree to purchase, and gave notice thereof to the defendant before 4 o'clock ; that he offered to pay the price, and requested the defendant to deliver the tobacco, which he refused. The Court, without hearing the counsel for the defendant, said that it was an engagement all on one side, and was therefore *nudum pactum* ; and Buller, J., said there was neither damage to the plaintiff nor advantage to the defendant at the time when the contract was first made. The judgment was affirmed in the Exchequer Chamber. This was treated by the plaintiff's counsel as an actual sale upon condition to avoid the statute of frauds, so that the real question was, as in the case before us, whether there was a bargain in fact amounting to a sale, as the question here is, whether there was an insurance in fact, the usual evidence of which only was left unfinished ; and it is as necessary that the obligation should be mutual in this case as in that. See also *Payne v. Cave*, 3 D. & E. 148. It is suggested that the putting the letter into the mail was a completion of the bargain, but if the vessel had arrived, and the plaintiff had recalled his letter, or if he had sent on an express to announce his refusal to accept before the letter arrived, we think he would not have been held to pay the premium.

No authority has been cited on the side of the plaintiff to support his case, and we cannot perceive, upon general principles, any ground upon which he can recover. There seems to have been *locus penitentiae* for both parties, no change of circumstances having occurred, nor any information being received, until the loss of the vessel was known, which was nearly three months after the correspondence ceased between the parties ; during all which time the plaintiff might have got insured elsewhere if the risk was a fair one. Had the vessel arrived after the defendants' letter was received and before it was answered, there can be no doubt the plaintiff might have declined entering into the bargain, because he then had made no contract ; and so long as it continued open for the plaintiff, it must have been open for the defendants, and their revocation was made before the plaintiff had opportunity to accept.

It was suggested in the argument, that the correspondence between these parties formed what is called in the civil law a *pollicitation*, a sort of contract which arises from a promise made by one party only, without any consent or acceptance by the other ; but this is a peculiar kind of obligation which exists only from an individual toward a body politic or government. Heinecc. sec. Ord. Pandect. Part VII., §§ 334, 335. In a note

to the first of these sections the author says, "For although promises made otherwise always require the consent and acceptance of the other party, yet here" (that is, in promises made to the State) "the law itself accepts the promise for the State."

Plaintiff nonsuit.

DUNLOP *v.* HIGGINS.

IN THE HOUSE OF LORDS, FEBRUARY 21, 22, 24, 1848.

[*Reported in 1 House of Lords Cases 381.*]

THIS was an appeal against a decree of the Court of Session, made under the following circumstances : Messrs. Dunlop & Co. were iron masters in Glasgow, and Messrs. Higgins & Co. were iron merchants in Liverpool. Messrs. Higgins had written to Messrs. Dunlop respecting the price of iron, and received the following answer :

"GLASGOW, January 22, 1845.

"We shall be glad to supply you with 2000 tons, pigs, at 65s. per ton, net, delivered here."

Messrs. Higgins wrote the following reply :

"LIVERPOOL, January 25, 1845.

"You say 65s. net, for 2000 tons pigs. Does this mean for our usual four months bill ? Please give us this information in course of post, as we have to decide with other parties on Wednesday next."

On the 28th Messrs. Dunlop wrote :

"Our quotation meant 65s. net, and not a four months bill."

This letter was received by Messrs. Higgins on January 30th, and on the same day, and by post, but not by the first post of that day, they dispatched an answer in these terms :

"We will take the 2000 tons pigs you offer us. Your letter crossed ours of yesterday, but we shall be glad to have your answer respecting the additional 1000 tons. In your first letter you omitted to state any terms, hence the delay." This letter was dated "January 31st." It was not delivered in Glasgow until 2 o'clock P.M. on February 1st, and, on the same day, Messrs. Dunlop sent the following reply :

"GLASGOW, February 1, 1845.

"We have your letter of *yesterday*, but are sorry that we cannot now enter the 2000 tons pig iron, our offer of the 28th not having been accepted in course."

Messrs. Higgins wrote on February 2d to say that they had erroneously dated their letter on January 31st, that it was really written and posted on the 30th, in proof of which they referred to the post-mark. They did not, however, explain the delay which had taken place in its delivery. The iron was not furnished to them, and iron having risen very rapidly in the market, the question whether there had been a complete contract between these parties was brought before a court of law. Messrs. Higgins instituted a suit in the Court of Session for damages, as for breach of contract. The defence of Messrs. Dunlop was, that their letter of the 28th, offering the contract, not having been answered in due time, there had been no such acceptance as would convert that offer into a lawful and binding contract; that their letter having been delivered at Liverpool before 8 o'clock in the morning of January 30th, Messrs. Higgins ought, according to the usual practice of merchants, to have answered it by the first post, which left Liverpool at 3 o'clock P.M. on that day. A letter so dispatched would be due in Glasgow at 2 o'clock P.M. on January 31st; another post left Liverpool for Glasgow every day at 1 o'clock A.M., and letters to be dispatched by that post must be put into the office during the preceding evening, and if any letter had been sent by that post on the morning of the 31st, it must have been delivered in Glasgow in the regular course of post at 8 o'clock in the morning of February 1st. As no communication from Messrs. Higgins arrived by either of these posts, Messrs. Dunlop contended that they were entitled to treat their offer as not accepted, and that they were not bound to wait until the third post delivered in Glasgow at 2 o'clock P.M., of Saturday, February 1st (at which time Messrs. Higgins' letter did actually arrive), before they entered into other contracts, the taking of which would disable them from performing the contract they had offered to Messrs. Higgins.

The cause came before Lord Ivory, as Lord Ordinary, who directed an issue, which he settled in the following terms:

"Whether, about the end of January, 1845, Messrs. Higgins purchased from Messrs. Dunlop 2000 tons of pig iron, at the price of 65s. per ton, and whether Messrs. Dunlop wrongfully failed to deliver the same, to the damage, loss, and injury of the pursuers? Damages laid at £6000." This issue was tried before the Lord Justice General, when it appeared that the letter of Messrs. Higgins, accepting the offer, was written on the 30th; that it was posted a short time after the closing of the bags for the dispatch at 3 o'clock P.M. on that day, and consequently did not leave Liverpool till the dispatch at 1 o'clock

in the morning of the 31st ; that in consequence of the slippery state of the roads, the bag then sent did not arrive at Warrington till after the departure of the down train that ought to have conveyed it, and that this circumstance occasioned it to be delayed beyond the ordinary hour of delivery. The Lord Justice General told the jury, "that he adopted the law as duly expounded in the case of *Adams v. Lindsell*,¹ and which is as follows : ' A. by a letter, offers to sell to B. certain specified goods, *receiving an answer by return of post* ; the letter being misdirected, the answer notifying the acceptance of the offer arrived two days later than it ought to have done ; on the day following that when it would have arrived, if the original letter had been properly directed, A. sold the goods to a third person,' and in which it was held 'that there was a contract binding the parties from the moment the offer was accepted, and that B. was entitled to recover against A. in an action for not completing his contract.' "

The counsel for Messrs. Dunlop tendered the following exceptions : The first exception related to evidence, and alleged "that no evidence to show that the letter, purporting to be dated on the 31st, was really written on January 30th, ought to have been admitted." The other exceptions related to the charge, and were as follow :

2. In so far as his Lordship directed the jury, in point of law, that if Messrs. Higgins posted their acceptance of the offer in due time according to the usage of trade, they are not responsible for any casualties in the post-office establishment.

3. In so far as his Lordship did not direct the jury in point of law, that if a merchant makes an offer to a party at a distance, by post-letter, requiring to be answered within a certain time, and no answer arrives within such time as it should arrive, if the party had written and posted his letter within the time allowed, the offerer is free, though the answer may have been actually written and posted in due time, if he is not proved to be aware of accidental circumstances preventing the due arrival of the answer.

4. In so far as his Lordship did not direct the jury, in point of law, that in the case above supposed, if an answer arrives, bearing a date beyond the time limited as above for making answer, and arrives by a mail, and is delivered at a time corresponding to such date, the offerer is entitled to consider himself free to deal with the goods as his own, either to sell or to hold, if he be not in the knowledge that the answer received was truly written of an earlier date, and delayed in its arrival by accident.

¹ 1 Barnewall & Alderson, 681.

5. In so far as his Lordship did not direct the jury, in point of law, that in case of failure to deliver goods sold at a stipulated price, and immediately deliverable, the true measure of damage is the difference between the stipulated price and the market price, on or about the day the contract is broken, or at or about the time when the purchaser might have supplied himself.¹

These exceptions were afterward argued before the judges of the First Division, who pronounced an interlocutor, disallowing the exceptions; and that interlocutor was the subject of the present appeal.

Bethell and *Anderson* for the appellants.

Stuart Wortley and *Hugh Hill* for the respondents were not called on.

THE LORD CHANCELLOR. My Lords, everything which learning or ingenuity can suggest on the part of the appellants, has undoubtedly been suggested on the part of the learned counsel who have just addressed the House; and if your Lordships concur in my view, that they have failed in making out their case, you will have the satisfaction of knowing that you have come to that conclusion after having had everything suggested to you that by possibility could be advanced in favor of this appeal.

The case certainly appears to me one which requires great ingenuity on the part of the appellants, because I do not think that, in the facts of the case, there is anything to warrant the appeal. The contest arises from an order sent from Liverpool to Glasgow, or rather a proposition sent from Glasgow to Liverpool, and accepted by the house at Liverpool. It is unnecessary to go earlier into the history of the case than the letter sent from Liverpool by Higgins, bearing date of January 31st. A proposition had been made by the Glasgow house of Dunlop, Wilson & Co., to sell 2000 tons of pig iron. The answer is of that date of January 31st: "Gentlemen, we will take the 2000 tons, pigs, you offer us." Another part of the letter refers to other arrangements; but there is a distinct and positive offer to take the 2000 tons of pigs. To that letter there is annexed a postscript in which they say: "We have accepted your offer unconditionally, but we hope you will accede to our request as to delivery and mode of payment by two months bill."

That, my Lords, therefore, is an unconditional acceptance, by the letter dated January 31st, which was proved to have been put into the post-office at Liverpool on the 30th; but it was not delivered, owing to the state of severe frost at that time, which

¹ So much of the opinion as relates to this question has been omitted.—ED.

delayed the mail from reaching Glasgow at the time at which, in the ordinary course, it would have arrived there. The letter having been put in on January 30th, it ought to have arrived at Glasgow on the following day, but it did not arrive till February 1st.

It appears that between the time of writing the offer and February 1st, the parties making the offer had changed their minds; and instead of being willing to sell 2000 tons of pig iron on the terms proposed, they were anxious to be relieved from that stipulation, and on that day, February 1st, they say: "We have yours of yesterday, but are sorry that we cannot enter the 2000 tons of pig iron, our offer of the 28th not having been accepted in course."

Under these circumstances, the parties wishing to buy, and by their letter accepting the offer, instituted proceedings in the Court of Session for damages sustained by the non-performance of the contract. And the first question raised by the first exception applies not to the summing up of the learned judge, but to the admission of evidence by him; for connected with that admission of evidence is the first exception. I need hardly say but little on this point, but as it formed part of the proceedings on which the judgment must ultimately be pronounced, I will very shortly call your Lordships' attention to the proposition presented for your decision by that first exception.

My Lords, the exception states, "that the pursuers having admitted that they were bound to answer the defenders' offer of the 28th, by letter written and posted on the 30th, and the only answer received by the defenders, being admitted to be dated January 31st, and received in Glasgow by the mail, which in due course ought to bring the Liverpool letters of the 31st, but not Liverpool letters of the 30th, it is not competent in a question as to the right of the defenders to withdraw or fall from the offer, to prove that the letter bearing date of January 31st was written and dispatched from Liverpool on the 30th, and prevented by accident from reaching Glasgow in due course, especially as it is not alleged that the defenders were aware (previous to February 3d) of any such accident having occurred."

The counsel for the pursuer answered, that nothing had been stated, but that the pursuers were bound instantly to answer the defenders' offer of January 28th, and that, according to the practice of merchants, it was sufficient if that letter was answered on that day on which it was received.

The Lord Justice General did overrule the objection, and admitted the evidence.

The exception is that the learned judge was wrong in permitting the pursuer to explain his mistake. The proposition is, that if a man is bound to answer a letter on a particular day, and by mistake puts a date in advance, he is to be bound by his error, whether it produces mischief to the other party or not. It is unnecessary to do more than state this proposition in order to induce you to assent to the view I take of the objection, and to come to the conclusion that the learned Judge was right in allowing the pursuer to go into evidence to show the mistake.

I pass on then to the fourth exception which is connected with this point, and which states that his Lordship did not direct the jury in point of law ; that in the case above supposed, if an answer arrives, bearing a date beyond the time limited as above for making answer, and arrives by a mail, and is delivered at a time corresponding to such date, the offerer is entitled to consider himself free to deal with the goods as his own, either to sell or to hold, if he was not in the knowledge that the answer received was duly written at an earlier date, and delayed in its arrival by accident—that is to say, that if a letter bears a date which, on the face of it, shows that it was written erroneously, nevertheless the party is bound by the date so written on the face of the letter, and you cannot go into the circumstances to explain how it happened that the letter did not arrive in time, but that you are bound to assume that it arrived on the day mentioned, and the party cannot give any evidence in explanation.

My Lords, that falls with the other exception, and the two together go for nothing. I merely state it for the purpose of asking your Lordships to concur in the opinion that I have formed—that the learned judge was correct in the mode in which he left the question to the jury, and consequently that on that point the bill of exceptions cannot be supported.

The next exception to be considered is the second, and that raises a more important question, though not one attended with much difficulty. The exception is, that his Lordship did direct the jury in point of law, that if the pursuers posted their acceptance of the offer in due time, according to the usage of trade, they are not responsible for any casualties in the post-office establishment.

Now, there may be some little ambiguity in the construction of that proposition. It proceeds on the assumption that, by the usage of trade, an answer ought to have been returned by the post, and that the 30th was the right day on which that answer ought to have been notified. Then comes the question,

whether, under those circumstances, that being the usage of trade, the fact of the letter being delayed, not by the act of the party sending it, but by an accident connected with the post, the party so putting the letter in on the right day is to lose the benefit which would have belonged to him if the letter had arrived in due course?

I cannot conceive, if that is the right construction of the direction of the learned judge, how any doubt can exist on the point. If a party does all that he can do, that is all that is called for. If there is a usage of trade to accept such an offer, and to return an answer to such an offer, and to forward it by means of the post, and if the party accepting the offer puts his letter into the post on the correct day, has he not done everything he was bound to do? How can he be responsible for that over which he has no control? It is not the same as if the date of the party's acceptance of the offer had been the subject of a special contract: as if the contract had been, "I make you this offer, but you must return me an answer on the 30th, and on the earliest post of that day." The usage of trade would require an answer on the day on which the offer was received, and Messrs. Higgins, therefore, did on the 30th, in proper time, return an answer by the right conveyance—the post-office.

If that was not correct, and if you were to have reference now to any usage constituting the contract between the parties a specific contract, it is quite clear to me that the rule of law would necessarily be that which has obtained by the usage of trade. It has been so decided in cases in England, and none has been cited from Scotland which controverts that proposition; but the cases in England put it beyond all doubt. It is not disputed—it is a very frequent occurrence, that a party having a bill of exchange, which he tenders for payment to the acceptor, and payment is refused, is bound to give the earliest notice to the drawer. That person may be resident many miles distant from him; if he puts a letter into the post at the right time, it has been held quite sufficient; he has done all that he is expected to do as far as he is concerned; he has put the letter into the post, and whether that letter be delivered, or not, is a matter quite immaterial, because for accidents happening at the post-office he is not responsible.

My Lords, the case of *Stocken v. Collen*,¹ is precisely a case of that nature, where the letter did not arrive in time. In that case Baron Parke says: "It was a question for the jury whether the letter was put into the post-office in time for delivery on the 28th. The post-office mark certainly raised a presumption

¹ 7 Meeson & Welsby, 515.

to the contrary, but it was not conclusive. The jurors have believed the testimony of the witness who posted the letter, and the verdict was therefore right. If a party puts a notice of dishonor into the post, so that in due course of delivery it would arrive in time, he has done all that can be required of him, and it is no fault of his if delay occurs in the delivery." Baron Alderson says : " The party who sends the notice is not answerable for the blunder of the post-office. I remember to have held so in a case on the Norfolk Circuit, where a notice addressed to Norwich had been sent to Warwick. If the doctrine that the post-office is only the agent for the delivery of the notice was correct, no one could safely avail himself of that mode of transmission. The real question is whether the party has been guilty of laches."

There is also the other case which has been referred to, which declares the same doctrine, the case of *Adams v. Lindsell*.¹ That is a case where the letter went, by the error of the party sending it, to the wrong place, but the party receiving it answered it, so far as he was concerned, in proper time. The party, however, who originally sent the offer not receiving the answer in proper time, thought he was discharged, and entered into a contract and sold the goods to somebody else. The question was, whether the party making the offer had a right to withdraw after notice of acceptance. He sold the goods after the party had written the letter of acceptance, but before it arrived he said, " I withdraw my offer." Therefore he said, " Before I received your acceptance of my offer I had withdrawn it." And that raised the question when the acceptance took place, and what constituted the acceptance. It was argued, that " till the plaintiff's answer was actually received, there could be no binding contract between the parties, and that before then the defendants had retracted their offer by selling the wool to other persons." But the Court said : " If that was so, no contract could ever be completed by the post, for if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered, in law, as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter."

Those two cases leave no doubt at all on the subject. Com-

¹ 1 Barnewall & Alderson, 681.

mon sense tells us that transactions cannot go on without such a rule, and these cases seem to be the leading cases on the subject ; and we have heard no authority cited which in the least degree affects the principle on which they proceed. The law of Scotland appears to be the same as the law of England, for Mr. Bell's Commentary lays down the same rule as existing in Scotland, and nothing has been stated to us in contradiction of his opinion.

Now whether I take that proposition as conclusive upon the objection, or whether I consider it as a question entirely open, whether the putting the letter into the post was, or not, in time to constitute a valid acceptance, it appears to me that the learned judge was right in the conclusion to which he came, that he was right in the mode in which he left the question to the jury, and that he was not bound to lay down the law in the manner alleged in the bill of exceptions.

The next exception is the third, which says : ' In so far as his Lordship did not direct the jury in point of law, that if a merchant makes an offer to a party at a distance, by post-letter, requiring to be answered within a certain time, and no answer arrives within such time as it should arrive, if the party had written and posted his letter within the time allowed, the offerer is free, though the answer may have actually been written and posted in due time, if he is not proved to be aware of accidental circumstances preventing the due arrival of the answer.' "

That, my Lords, raises, first of all, a proposition that does not arise in this case at all. It assumes a contract that requires an answer within a certain stipulated time, and it assumes (which is already disposed of by what I have said in answer to the second exception) that the putting a letter into the post is not a compliance with the requisition of the offer. But there is no special contract here, and therefore this exception cannot be maintained.

I believe that in these remarks I have exhausted the whole of the objections made, and my advice to your Lordships is to affirm the judgment of the Court from which this is appealed.

It was ordered that the interlocutor complained of should be affirmed with costs.

WILLIAM H. TAYLOE, APPELLANT, v. THE MERCHANTS' FIRE INSURANCE COMPANY
OF BALTIMORE.

IN THE SUPREME COURT OF THE UNITED STATES, JANUARY
TERM, 1850.

[*Reported in 9 Howard 390.*]

Johnson for the appellant.

Lloyd and *Nelson* for the appellees.

Mr. JUSTICE NELSON delivered the opinion of the Court.¹

This is an appeal from a decree of the Circuit Court for the District of Maryland, which was rendered for the defendants.

The case in the Court below was this : William H. Tayloe, of Richmond County, Va., applied to John Minor, the agent of the defendants, residing at Fredericksburg in that State, for an insurance upon his dwelling-house to the amount of \$8000 for one year, and, as he was about leaving home for the State of Alabama, desired the agent to make the application in his behalf.

The application was made accordingly, under the date of November 25th, 1844, and an answer received from the secretary of the company, stating that the risk would be taken at 70 cents on the \$1000, the premium amounting to the sum of \$56. The agent stated in the application to the company the reason why it had not been signed by Tayloe ; that he had gone to the State of Alabama on business, and would not return till February following, and that he was desired to communicate to him at that place the answer of the company.

On receiving the answer, the agent mailed a letter directed to Tayloe, under date of December 2d, advising him of the terms of the insurance, and adding, "Should you desire to effect the insurance, send me your check payable to my order for \$57, and the business is concluded." The additional dollar was added for the policy.

This letter, in consequence of a misdirection, did not reach Tayloe till the 20th of the month ; who, on the next day, mailed a letter in answer to the agent, expressing his assent to the terms, and inclosing his check for the premium as requested. He also desired that the policy should be deposited in the bank for safe-keeping. This letter of acceptance was received on the 31st at Fredericksburg by the agent, who mailed a letter in

¹ The statement of facts has been omitted.—ED.

answer the next day, communicating to Tayloe his refusal to carry into effect the insurance, on the ground that his acceptance came too late, the centre building of the dwelling-house in the mean time, on the 22d of the month, having been consumed by fire.

The company, on being advised of the facts, confirmed the view taken of the case by their agent, and refused to issue the policy or pay the loss.

A bill was filed in the Court below by the insured against the company, setting forth, substantially, the above facts, and praying that the defendants might be decreed to pay the loss, or for such other relief as the complainant might be entitled to.

I. Several objections have been taken to the right of the complainant to recover, which it will be necessary to notice ; but the principal one is that the contract of insurance was not complete at the time the loss happened, and therefore that the risk proposed to be assumed had never attached.¹

Two positions have been taken by the counsel for the company for the purpose of establishing this ground of defence.

1. The want of notice to the agent of the company of the acceptance of the terms of the insurance ; and,

2. The non-payment of the premium.

The first position assumes that, where the company have made an offer through the mail to insure upon certain terms, the agreement is not consummated by the mere acceptance of the offer by the party to whom it is addressed ; that the contract is still open and incomplete until the notice of acceptance is received ; and that the company are at liberty to withdraw the offer at any time before the arrival of the notice, and this even without communicating notice of the withdrawal to the applicant ; in other words, that the assent of the company, express or implied, after the acceptance of the terms proposed by the insured, is essential to a consummation of the contract.

The effect of this construction is to leave the property of the insured uncovered until his acceptance of the offer has reached the company and has received their assent, for if the contract is incomplete until notice of the acceptance, till then the company may retract the offer, as neither party is bound until the negotiation has resulted in a complete bargain between the parties.

In our apprehension, this view of the transaction is not in accordance with the usages and practice of these companies in taking risks ; nor with the understanding of merchants and other business men dealing with them ; nor with the principles

¹ Only so much of the opinion is given as relates to this question.—ED.

of law, settled in analogous cases, governing contracts entered into by correspondence between parties residing at a distance.

On the contrary, we are of opinion that an offer under the circumstances stated, prescribing the terms of insurance, is intended, and is to be deemed, a valid undertaking on the part of the company, that they will be bound, according to the terms tendered, if an answer is transmitted in due course of mail, accepting them ; and that it cannot be withdrawn, unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted.

This view of the effect of the correspondence seems to us to be but carrying out the intent of the parties, as plainly manifested by their acts and declarations.

On the acceptance of the terms proposed, transmitted by due course of mail to the company, the minds of both parties have met on the subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete. The party to whom the proposal is addressed has a right to regard it as intended as a continuing offer until it shall have reached him, and shall be in due time accepted or rejected.

Such is the plain import of the offer. And besides, upon any other view, the proposal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be, in turn, proposed by the applicant to the company for their approval or rejection. For, if the contract is still open until the company is advised of an acceptance, it follows, of course, that the acceptance may be repudiated at any time before the notice is received. Nothing is effectually accomplished by an act of acceptance.

It is apparent, therefore, that such an interpretation of the acts of the parties would defeat the object which both had in view in entering upon the correspondence.

The fallacy of the argument, in our judgment, consists in the assumption, that the contract cannot be consummated without a knowledge on the part of the company that the offer has been accepted. This is the point of the objection. But a little reflection will show that, in all cases of contracts entered into between parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present.

The position may be illustrated by the case before us. If the contract became complete, as we think it did, on the acceptance of the offer by the applicant, on December 21st, 1844, the company, of course, could have no knowledge of it until the letter

of acceptance reached the agent, on the 31st of the month ; and, on the other hand, upon the hypothesis it was not complete until notice of the acceptance, and then became so, the applicant could have no knowledge of it at the time it took effect. In either aspect, and, indeed, in any aspect in which the case can be presented, one of the parties must be unadvised of the time when the contract takes effect, as its consummation must depend upon the act of one of them in the absence of the other.

The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time ; nor, for the same reason, can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence ; the acceptance must succeed the offer after the lapse of some interval of time ; and, if the process is to be carried farther in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from the one party to the other.

It is obviously impossible, therefore, under the circumstances stated, ever to perfect a contract by correspondence, if a knowledge of both parties at the moment they become bound is an essential element in making out the obligation. And as it must take effect, if effect is given at all to an endeavor to enter into a contract by correspondence, in the absence of the knowledge of one of the parties at the time of its consummation, it seems to us more consistent with the acts and declarations of the parties, to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated ; instead of postponing its completion till notice of such acceptance has been received and assented to by the company.

For why make the offer, unless intended that an assent to its terms should bind them ? And why require any further assent on their part, after an unconditional acceptance by the party to whom it is addressed ?

We have said that this view is in accordance with the usages and practice of these companies, as well as with the general principles of law governing contracts entered into by absent parties.

In the instructions of this company to their agent at Fredericksburg, he is advised to transmit all applications for insurance to the office for consideration ; and that, upon the receipt of an answer, if the applicant accepts the terms, the contract is considered complete without waiting to communicate the acceptance to the company ; and the policy to be thereafter issued is to bear date from the time of the acceptance.

The company desire no further communication on the sub-

ject, after they have settled upon the terms of the risk, and sent them for the inspection of the applicant, in order to the consummation of the bargain. The communication of the acceptance by the agent afterward is to enable them to make out the policy. The contract is regarded as complete on the acceptance of the terms.

This appears also to have been the understanding of the agent ; for, on communicating to the insured the terms received from the company, he observes : " Should you desire to effect the above insurance, send me your check payable to my order for \$57, and the business is concluded ;" obviously enough importing that no other step would be necessary to give effect to the insurance of the property upon the terms stated.

The cases of *Adams v. Linsdell*, 1 Barn. & Ald. 681, and *Mactier's Adm'rs v. Frith*, 6 Wend. 104, are authorities to show that the above view is in conformity with the general principles of law governing the formation of all contracts entered into between parties residing at a distance by means of correspondence.

The unqualified acceptance by the one of the terms proposed by the other, transmitted by due course of mail, is regarded as closing the bargain from the time of the transmission of the acceptance.

This is also the effect of the case of *Eliason v. Henshaw*, 4 Wheat. 228, in this Court, though the point was not necessarily involved in the decision of the case. The acceptance there had not been according to the terms of the bargain proposed, for which reason the plaintiff failed.

Upon the whole, without pursuing the examination further, we are of opinion that the decree of the Court below should be reversed, and that the cause be remitted, with directions to the Court to take such further proceedings therein as may be necessary to carry into effect the opinion of this Court.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to that Court to take such proceedings therein as may be necessary to carry into effect the opinion of this Court.

GEORGE W. HALLOCK v. THE COMMERCIAL
INSURANCE COMPANY.

IN THE SUPREME COURT OF NEW JERSEY, JUNE TERM, 1857.

[Reported in 26 New Jersey Law Reports 268.]

AN action of trespass on the case was brought in this Court by George W. Hallock against the Commercial Insurance Company.

The plaintiff declared on a policy of insurance, and the defendants pleaded the general issue. The case was tried at the Hudson Circuit, before a jury, at May Term, 1856.

The Court directed that a verdict should be taken for the plaintiff, with liberty to make a special case for the opinion of the Supreme Court, or turn it into a special verdict, at the instance of either party, within ninety days after the judgment of the Supreme Court should be rendered and entered.

The cause was argued at February Term, 1857, before the CHIEF JUSTICE and Justices POTTS and VREDENBURGH.¹

A. O. Zabriskie for the plaintiff.

I. W. Scudder for the defendants.

VREDENBURGH, J. G. W. Breck was the agent of the defendants at Bath, N. Y., to make surveys, receive proposals for insurance, and receive premiums on risks accepted by the company, but was not authorized to make insurances or issue policies. The proposals for insurance were sent by him to the company at Jersey City, and if accepted by them, the policies were to be sent to him to deliver.

On March 2d, 1855, the plaintiff applied to him to insure his building in Bath, for one year from March 10th, for \$1200. Breck made the survey, and told him what the premium would be. The plaintiff thereupon offered the premium to Breck, who said he would consider it as paid, but would leave it with the plaintiff, who was a banker and with whom he kept his account, until the policy arrived, when he would call and get the money. The application was signed by the plaintiff, and with the survey attached, was sent by Breck to the company, on March 2d or 3d. The defendants deferred acting on the application until the secretary could procure a map of Bath, referred to by Breck.

On March 13th, between 10 and 12 A.M., the map having been received, a policy was filled up on said building, insuring it

¹ A portion of the statement of facts has been omitted.—ED.

from March 10th for one year, signed by the proper officers, and mailed at Jersey City, directed to Breck at Bath, which by due course of mail would have reached him on March 14th, but which, owing to the snow, did not until March 16th. At the same time that Breck received the policy he also received a telegraphic despatch, dated March 15th, as follows: "Risk not taken when burnt. Return policy when received."

Accompanying the policy was also a letter from the secretary, of the tenor following:

"OFFICE OF THE COMMERCIAL INSURANCE COMPANY,

NO. 3 MONTGOMERY STREET, JERSEY CITY, March 13, 1855.

"MESSRS. BRECK AND SAWYER, Esq's, Bath, N. Y.:

"DEAR SIR: Your application on G. W. Hallock's saloon has been held under advisement till we could procure a copy of the map, of which you speak in your letter. We do not look on it as a very desirable risk, but nevertheless, as the rate seems a fair one, we enclose a policy, relying very much on your representation in regard to the good character of the occupant. Enclosed please find policy, No. 1054, for \$1200, premium \$24.

"Respectfully,

"J. M. CHAPMAN,

"Secretary."

On March 16th, after the policy arrived, the plaintiff tendered the premium in gold to Breck, and demanded the policy. Breck accepted the money, because he had refused to accept it when the application was made, and considered it on deposit, meaning to put the plaintiff in the same situation as if he had received it on March 2d, but refused to deliver the policy, because so directed by the defendants.

The building insured was entirely consumed by fire on March 13th at 8 A.M., about two hours before the risk was accepted or the policy signed. There was a variance between the policy declared on and the original, in the time of payment of the insurance and the name of the officers who signed the policy. The suit is on the policy, and the plea the general issue.

As to the variances, there is no proof, nor even any allegation, that the defendants were misled by them to their prejudice, and they must consequently, under the 43d section of the Act of 1855 (Nix. Dig. 641) be deemed to be immaterial.

The defendants submit two other points—viz.:

First. That the policy is void, because when made the loss had already occurred;¹ second, that the policy never did become a contract of insurance.

¹ So much of the opinion as relates to this question has been omitted.—ED.

Secondly. The defendants insist that the policy never did become a contract of insurance ; that even if the fire had happened on March 14th, or at any time afterward, no action could have been sustained upon it.

The defendants suggest three reasons why the policy never became a contract.

First. Because the premium never was paid.¹

Second. Because the application of the plaintiff cannot be considered as an existing offer when the policy was signed.

Third. Because the policy never was delivered.

Secondly. The defendants insist that the application, having been made on March 2d, and no action having been taken by the defendants until the 13th, we cannot consider the plaintiff as still continuing his offer to the defendants ; that we are bound to consider it as withdrawn. But why so ? There is no pretence of any express withdrawal. The question and the answer can never, in any case, be simultaneous ; the question must always remain for some length of time with the one to whom it is put, and abide the answer. In every negotiation, whether by telegraph, by letter, or by word of mouth, the application and the answer can never be at the same precise instant. The application must wait upon the answer. If the application is considered to be withdrawn as soon as made, no two minds ever could meet upon any proposition. The *aggregation* never could take place. In all cases the application is construed to stand until the contrary appears ; until it is either withdrawn or answered. Pothier *Traite du Contrat du vente*, p. 1, § 2, Art. 3, No. 32 ; *Mactier v. Frith*, 6 Wend. 103.

But here the plaintiff avers the application to be still standing. The defendants treat it as still before them on March 13th, by accepting it, and making out the policy. We must therefore treat it as the parties treat it, as still at noon on March 13th a standing and valid offer by the plaintiff to the defendants.

Thirdly. The defendants contend that the policy never was delivered, so as to make it a living contract. But it appears, by the case, that the contract to insure was complete before they mailed the policy to Breck. Their telegraphic despatch, dated on March 15th, says, " Risk not taken when burnt ; return policy when received." This necessarily implies that the risk was taken, but taken after the fire. Breck had no authority to insure. *After* the proposals were accepted by the company, they made out the policies, and sent them to Breck to deliver ; so that it appears, by the case, that before they mailed the

¹ So much of the opinion as relates to this question has been omitted.—ED.

policy to Breck, they must have received the premium and accepted the risk, and thus completed the contract to insure. If the case had gone no further, and no policy had ever been made out, it is well settled that the plaintiff could have sued them upon this contract at law or forced from them a policy in equity. *Perkins v. Washington Ins. Co.*, 4 Cow. 660; *Hamilton v. Lycoming Ins. Co.*, 5 Barr. 339; *Angell on Fire Ins.*, §§ 34, 47; *Union Mutual v. The Commercial Mutual*, Law Reporter, March, 1856, p. 610.

Under these circumstances, a policy drawn up and signed by the proper officers wants no further delivery. It is a vital policy as soon as signed, becomes instantly the property of the insured, and is held by the insurer for his use. *Ang. on Fire Ins.*, §§ 33, 31; *Pim v. Reed*, 6 Man. & Grang. 1; *Kohne v. Ins. Co.*, 1 Wash. C. C. R. 93.

But here were further acts of delivery of the policy. It was, on March 13th, mailed, and sent to Breck, to deliver to the plaintiff. This was sending it to the plaintiff by Breck. Breck and the mail were only the vehicles to carry it to him. It was the same thing as if mailed or sent directly to the plaintiff. The defendants suggest, in answer, that Breck was their agent, and that, by sending it to him, they did not part with the possession of the policy, and that they only gave authority to Breck to deliver, which they could and did revoke before actual delivery. But when they mailed the policy to Breck to deliver, they did not constitute him their agent, to receive or keep it for them, nor to retain it as their agent. He was, in that regard, no agent of theirs; he had nothing further to do for them. By sending him the policy to deliver, they made Breck trustee for the plaintiff; they made it a deposit with Breck to the credit of the plaintiff. It was a delivery to Breck to deliver to the plaintiff, which was a good delivery to the plaintiff. *Shep. Touch.* 58. This is not a question of the authority or acts of an agent; but whether the defendants, by sending the policy to Breck to deliver, did an overt act intended to signify that the policy should have a present vitality. This certainly was such an act. Without any further interference on their part it would have resulted in actual delivery to the plaintiff. It was intended to signify to the plaintiff not only that the policy was a present contract, but to effect an actual delivery of it to him. *Kentucky Mutual Ins. Co. v. Jenks*, 5 Porter (Ind.) R. 96; 5 Barr. 339; 6 How. 390.

Suppose the defendants had retained the policy, and had merely told Breck to tell the plaintiff that they held the policy subject to the plaintiff's order, would they not have been deemed as holding the policy for the plaintiff?

The defendants next suggest that the plaintiff was ignorant of their acceptance of the risk, of their making out and mailing the policy to Breck until after they had countermanded its delivery, and that the *aggregatio mentium* could not take place until after the acceptance of the proposition by the defendants came to the plaintiff's knowledge, and that before that the defendants had changed their own minds, so that in fact it never did take place, and that consequently there was no legal delivery of this policy.

This involves the more general question, does a contract arise when an overt act is done intended to signify the acceptance of a specific proposition, or not until that overt act comes to the knowledge of the proposer? This question may arise upon every mode of negotiating a contract, whether the parties be in each other's presence or not. First comes the mental resolve to accept the proposition; but the law can only recognize an overt act. Whether that act be a word spoken, a telegraphic sign, or a letter mailed, some interval of time, more or less appreciable, must intervene between the doing of the act and its coming to the knowledge of the party to whom it is addressed. In the mean time, what is the condition of affairs? Is it a contract or no contract? If the bidder does not see the auctioneer's hammer fall; if the article written for and sent never arrives; if the verbal answer, when the parties are in each other's presence, is in a foreign tongue, or by sudden noise or distraction is not heard; if the telegraphic circuit is broken; if the mail miscarries; if the word spoken or the letter sent is overtaken, and countermanded by the electric current, is there no contract? In the progress of the negotiation, at what precise point of time does mind meet mind, does the contract spring into life?

Upon this subject, with respect to negotiations conducted by written communications, there has been some variety of decision, but it appears to me that the weight of authority, as well as reason and necessity, admit of but one solution.

The meeting of two minds, the *aggregatio mentium* necessary to the constitution of every contract, must take place *eo instanti* with the doing of any overt act intended to signify to the other party the acceptance of the proposition, without regard to when that act comes to the knowledge of the other party; everything else must be question of proof or of the binding force of the contract by matters subsequent. The overt act may be as various as the form and nature of contracts. It may be by the fall of the hammer, by words spoken, by letter, by telegraph, by remitting the article sent for, by mutual signing or by delivery

of the paper, and the delivery may be by any act intended to signify that the instrument shall have a present vitality. Whatever the form, the act done is the irrevocable evidence of the *aggregatio mentium*; at that instant the bargain is struck. The acceptor can no more overtake and countermand by telegraph his letter mailed than he can his words of acceptance after they have issued from his lips on their way to the hearer. If the two minds do not meet *eo instanti* with the act signifying acceptance, when can they, in the nature of things, ever approach each other more closely? The defendants say, when the act of acceptance comes to the knowledge of the other party. But this knowledge would be a fact without any force, unless we suppose in the proposer a power still of electing not to accept the acceptance. But if we do this, it is apparent that the negotiation is yet precisely in the same stage of development it was in when the first proposition was waiting upon the first answer. The notion that there is no contract until the acceptance comes to the knowledge of the other party, proceeds upon the ground, in the first place, that the proposal has been withdrawn or lost its force, which is against the intent of the parties and the necessities of the case; and in the second place, upon the ground that the answer is conditional, whereas we suppose it to be absolute. We suppose the acceptor to say not simply I agree, but to say I agree if you do, which requires an answer from the proposer; so that the minds do not meet till he answers. But in the mean time the acceptor may have changed his mind, and for the same reason as before, there is no bargain until this last answer comes to the knowledge of the other party; and so, upon this theory, it must go on *ad infinitum* without the possibility of the *aggregatio mentium* ever taking place. There is, in fact, no difference between the acceptance of a proposition by word of mouth and a letter stating an acceptance. In the one case it is articulate sounds carried by the air, in the other, written signs carried by the mail or by telegraph. The vital question is, was the intention manifested by any overt act, not by what kind of messenger it was sent. The bargain, if ever struck at all, must be *eo instanti* with such overt act. Mailing a letter containing an acceptance, or the instrument itself intended for the other party, is certainly such an act. *Adams v. Lindsell*, 1 Barn. & Ald. 681; *Dunlop v. Higgins*, 1 House of Lords Cases, 381; *Duncan v. Topham*, 8 C. B. 225; *Potter v. Saunders*, 6 Hare, 1; *Tayloe v. Merchants' Ins. Co.*, 9 How. 390; *Hamilton v. Lycoming Ins. Co.*, 5 Barr. 339; *Vassar v. Camp*, 14 Barb. 341; *Mactier v. Frith*, 6 Wend. 103; *Kentucky Mutual v. Jenks*, 5 Porter's (Ind.) R. 96. This last

case, in all its essential features, is identical with the one before us.

The only English case sustaining the defendants in their view that I have seen, is that of *Cooke v. Oxley*, 3 Term R. 653,¹ which, it will be perceived by the above references, has been effectually overruled in their courts.

In the State of New York the case of *Mactier v. Frith*, 1 Paige, 434, was reversed in their Court of Errors by a very large vote (6 Wend. 111), and the doctrine sustained as contended for by the plaintiff.

The only other American case on this side of the question is that of *McCulloch v. The Eagle Ins. Co.*, 1 Pick. 278. This last is against the whole current of authorities both in England and in this country, and appears to me requires for the creation of a contract a fact without significance, or a condition that would render its creation impossible.

Let judgment be entered on the verdict for the plaintiff.¹

THE HOUSEHOLD FIRE AND CARRIAGE ACCIDENT INSURANCE COMPANY (LIMITED) *v.* GRANT.

IN THE COURT OF APPEAL, JULY 1, 1879.

[*Reported in Law Reports, 4 Exchequer Division 216.*]

ACTION to recover £94 15s. being the balance due upon 100 shares allotted to the defendant on October 25th, 1874, in pursuance of an application from the defendant for such shares dated September 30th, 1874.

At the trial before Lopes, J., during the Middlesex Sittings, 1878, the following facts were proved. In 1874 one Kendrick was acting in Glamorganshire as the agent of the company for the placing of their shares, and on September 30th the defendant handed to Kendrick an application in writing for shares in the plaintiffs' company, which stated that the defendant had paid to the bankers of the company £5, being a deposit of 1s. per share, and requesting an allotment of 100 shares, and agreeing to pay the further sum of 19s. per share within twelve months of the date of the allotment. Kendrick duly forwarded this application to the plaintiffs in London, and the secretary of the company on October 20th, 1874, made out the letter of allotment in favor of the defendant, which was posted addressed

¹ The concurring opinion of Potts, J., has been omitted.—ED.

to the defendant at his residence, 16 Herbert Street, Swansea, Glamorganshire; his name was then entered on the register of shareholders. This letter of allotment never reached the defendant. The defendant never paid the £5 mentioned in his application, but the plaintiffs' company being indebted to the defendant in the sum of £5 for commission, that sum was duly credited to his account in their books. In July, 1875, a dividend at the rate of $2\frac{1}{2}$ per cent was declared on the shares, and in February, 1876, a further dividend at the same rate; these dividends, amounting altogether to the sum of 5s., was also credited to the defendant's account in the books of the plaintiffs' company. Afterward the company went into liquidation, and on December 7th, 1877, the official liquidator applied for the sum sued for from the defendant; the defendant declined to pay on the ground that he was not a shareholder.

On these facts the learned judge left two questions to the jury. 1. Was the letter of allotment of October 20th in fact posted? 2. Was the letter of allotment received by the defendant? The jury found the first question in the affirmative and the last in the negative.

The learned judge reserved the case for further consideration, and after argument directed judgment to be entered for the plaintiffs on the authority of *Dunlop v. Higgins*.¹

The defendant appealed.

Finlay and Dillwyn for the defendant.

Wilberforce and G. Arbuthnot (W. G. Harrison, Q.C., with them) for the plaintiffs.

The following judgments were delivered:

THESIGER, L.J. In this case the defendant made an application for shares in the plaintiffs' company under circumstances from which we must imply that he authorized the company, in the event of their allotting to him the shares applied for, to send the notice of allotment by post. The company did allot him the shares, and duly addressed to him and posted a letter containing the notice of allotment, but upon the finding of the jury it must be taken that the letter never reached its destination. In this state of circumstances Lopes, J., has decided that the defendant is liable as a shareholder. He based his decision mainly upon the ground that the point for his consideration was covered by authority binding upon him, and I am of opinion that he did so rightly, and that it is covered by authority equally binding upon this Court.

The leading case upon the subject is *Dunlop v. Higgins*.² It is true that Lord Cottenham might have decided that case with-

¹ 1 H. L. C. 381.

² *Ibid.*

out deciding the point raised in this. But it appears to me equally true that he did not do so, and that he preferred to rest and did rest his judgment as to one of the matters of exception before him upon a principle which embraces and governs the present case. If so, the Court is as much bound to apply that principle, constituting as it did a *ratio decidendi*, as it is to follow the exact decision itself. The exception was that the Lord Justice General directed the jury in point of law that, if the pursuers posted their acceptance of the offer in due time, according to the usage of trade they were not responsible for any casualties in the post-office establishment. This direction was wide enough in its terms to include the case of the acceptance never being delivered at all; and Lord Cottenham, in expressing his opinion that it was not open to objection, did so, after putting the case of a letter containing a notice of dishonor posted by the holder of a bill of exchange in proper time, in which case he said :¹ "Whether that letter be delivered or not is a matter quite immaterial, because for accidents happening at the post-office he is not responsible." In short, Lord Cottenham appears to me to have held that, as a rule, a contract formed by correspondence through the post is complete as soon as the letter accepting an offer is put into the post, and is not put an end to in the event of the letter never being delivered. My view of the effect of *Dunlop v. Higgins*² is that taken by James, L.J., in *Harris's Case*;³ there⁴ he speaks of the former case as "a case which is binding upon us, and in which every principle argued before us was discussed at length by the Lord Chancellor in giving judgment;" he adds, the Lord Chancellor "arrived at the conclusion that the posting of the letter of acceptance is the completion of the contract—that is to say, the moment one man has made an offer, and the other has done something binding himself to that offer, then the contract is complete, and neither party can afterward escape from it." Mellish, J., also took the same view; he says :⁵ "In *Dunlop v. Higgins*⁶ the question was directly raised whether the law was truly expounded in the case of *Adams v. Lindsell*."⁷ The House of Lords approved of the ruling of that case. The Lord Chancellor Cottenham said, in the course of his judgment, that in the case of a bill of exchange, notice of dishonor, given by putting a letter into the post at the right time, had been held quite sufficient whether that letter was delivered or not; and he referred to *Stocken v. Collin*⁸ on that point, he being clearly of

¹ 1 H. L. C. at p. 399.⁴ *Ibid.*, at p. 592.⁷ 1 B. & A. 681.² *Ibid.*, 381.⁵ *Ibid.*, at p. 595.⁸ 7 M. & W. 515.³ Law Rep. 7 Ch. 587.⁶ 1 H. L. C. 381.

opinion that the rule as to accepting a contract was exactly the same as the rule as to sending notice of dishonor of a bill of exchange. He then referred to the case of *Adams v. Lindsell*,¹ and quoted the observation of Lord Ellenborough, C.J. That case therefore appears to me to be a direct decision that the contract is made from the time when it is accepted by post." Leaving *Harris's Case*² for the moment, I turn to *Duncan v. Topham*,³ in which Cresswell, J., told the jury that if the letter accepting the contract was put into the post-office and lost by the negligence of the post-office authorities, the contract would nevertheless be complete; and both he and Wilde, C.J., and Maule, J., seem to have understood this ruling to have been in accordance with Lord Cottenham's opinion in *Dunlop v. Higgins*.⁴ That opinion therefore appears to me to constitute an authority directly binding upon us. But if *Dunlop v. Higgins*⁵ were out of the way, *Harris's Case*⁶ would still go far to govern the present. There it was held that the acceptance of the offer at all events binds both parties from the time of the acceptance being posted, and so as to prevent any retraction of the offer being of effect after the acceptance has been posted. Now, whatever in abstract discussion may be said as to the legal notion of its being necessary, in order to the effecting of a valid and binding contract, that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of the formation of contracts. Unless therefore a contract constituted by correspondence is absolutely concluded at the moment that the continuing offer is accepted by the person to whom the offer is addressed, it is difficult to see how the two minds are ever to be brought together at one and the same moment. This was pointed out by Lord Ellenborough in the case of *Adams v. Lindsell*,⁷ which is recognized authority upon this branch of the law. But, on the other hand, it is a principle of law, as well established as the legal notion to which I have referred, that the minds of the two parties must be brought together by mutual communication. An acceptance, which only remains in the breast of the acceptor without being actually and by legal implication communicated to the offerer, is no binding acceptance. How, then, are these elements of law to be harmonized in the case of contracts formed by correspondence through the post? I see no better mode than that of treat-

¹ 1 B. & A. 681.

² Law Rep. 7 Ch. 587.

³ 8 C. B. 225.

⁴ 1 H. L. C. 381.

⁵ *Ibid.*

⁶ Law Rep. 7 Ch. 587.

⁷ 1 B. & A. 681.

ing the post-office as the agent of both parties, and it was so considered by Lord Romilly in *Hebb's Case*,¹ when in the course of his judgment he said : " *Dunlop v. Higgins*² decides that the posting of a letter accepting an offer constitutes a binding contract, but the reason of that is, that the post-office is the common agent of both parties." Alderson, B., also in *Stocken v. Collin*,³ a case of notice of dishonor, and the case referred to by Lord Cottenham, says : " If the doctrine that the post-office is only the agent for the delivery of the notice were correct, no one could safely avail himself of that mode of transmission." But if the post-office be such common agent, then it seems to me to follow that, as soon as the letter of acceptance is delivered to the post-office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance. What other principle can be adopted short of holding that the contract is not complete by acceptance until and except from the time that the letter containing the acceptance is delivered to the offerer, a principle which has been distinctly negatived ? This difficulty was attempted to be got over in the *British and American Telegraph Co. v. Colson*,⁴ which was a case directly on all fours with the present, and in which Kelly, C.B.,⁵ is reported to have said : " It may be that in general, though not in all cases, a contract takes effect from the time of acceptance and not from the subsequent notification of it. As in the case now before the Court, if the letter of allotment had been delivered to the defendant in the due course of the post he would have become a shareholder from the date of the letter. And to this effect is *Potter v. Sanders*.⁶ And hence, perhaps, the mistake has arisen that the contract is binding upon both parties from the time when the letter is written and put into the post, although never delivered ; whereas although it may be binding from the time of acceptance, it is only binding at all when afterward duly notified." But with deference I would ask how a man can be said to be a shareholder at a time before he was bound to take any shares, or to put the question in the form in which it is put by Mellish, L.J., in *Harris's Case*,⁷ how there can be any relation back in a case of this kind as there may be in bankruptcy. If, as the Lord Justice said, the contract after the letter has arrived in time is to be treated as having been

¹ Law Rep. 4 Eq. at p. 12.

⁵ *Ibid.*, at p. 115.

² 1 H. L. C. 381.

⁶ 6 Hare, 1.

³ 7 M. & W. at p. 516.

⁷ Law Rep 586, at p. 596.

⁴ Law Rep. 6 Ex. 108.

made from the time the letter is posted, the reason is that the contract was actually made at the time when the letter was posted. The principle indeed laid down in *Harris's Case*¹ as well as in *Dunlop v. Higgins*,² can really not be reconciled with the decision in the *British and American Telegraph Co. v. Colson*.³ James, L.J., in the passage I have already quoted⁴ affirms the proposition that when once the acceptance is posted neither party can afterward escape from the contract, and refers, with approval, to *Hebb's Case*.⁵ There a distinction was taken by the Master of the Rolls that the company chose to send the letter of allotment to their own agent, who was not authorized by the applicant for shares to receive it on his behalf, and who never delivered it, but he at the same time assumed that if, instead of sending it through an authorized agent, they had sent it through the post-office, the applicant would have been bound, although the letter had never been delivered. Mellish, L.J., really goes as far, and states forcibly the reasons in favor of this view. The mere suggestion thrown out (at the close of his judgment, at p. 597), when stopping short of actually overruling the decision in the *British and American Telegraph Co. v. Colson*,⁶ that although a contract is complete when the letter accepting an offer is posted, yet it may be subject to a condition subsequent that, if the letter does not arrive in due course of post, then the parties may act on the assumption that the offer has not been accepted, can hardly, when contrasted with the rest of the judgment, be said to represent his own opinion on the law upon the subject. The contract, as he says,⁷ is actually made when the letter is posted. The acceptor, in posting the letter, has, to use the language of Lord Blackburn, in *Brogden v. Directors of Metropolitan Ry. Co.*,⁸ "put it out of his control and done an extraneous act which clinches the matter, and shows beyond all doubt that each side is bound." How, then, can a casualty in the post, whether resulting in delay, which in commercial transactions is often as bad as no delivery, or in non-delivery, unbind the parties or unmake the contract? To me it appears that in practice a contract complete upon the acceptance of an offer being posted, but liable to be put an end to by an accident in the post, would be more mischievous than a contract only binding upon the parties to it upon the acceptance actually reaching the offerer, and I can see no principle of law from which such an anomalous contract can be deduced.

¹ Law Rep. 586, at p. 596.

² 1 H. L. C. 381.

³ Law Rep. 6 Ex. 108.

⁴ *Harris's Case*, Law Rep. 7 Ch. 592.

⁵ Law Rep. 4 Eq. 9.

⁶ Law Rep. 6 Ex. 108.

⁷ *Ibid.*, at p. 596.

⁸ 2 App. Cas. 666, 691.

There is no doubt that the implication of a complete, final, and absolutely binding contract being formed, as soon as the acceptance of an offer is posted, may in some cases lead to inconvenience and hardship. But such there must be at times in every view of the law. It is impossible in transactions which pass between parties at a distance, and have to be carried on through the medium of correspondence, to adjust conflicting rights between innocent parties, so as to make the consequences of mistake on the part of a mutual agent fall equally upon the shoulders of both. At the same time I am not prepared to admit that the implication in question will lead to any great or general inconvenience or hardship. An offerer, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. If he trusts to the post he trusts to a means of communication which, as a rule, does not fail, and if no answer to his offer is received by him, and the matter is of importance to him, he can make inquiries of the person to whom his offer was addressed. On the other hand, if the contract is not finally concluded, except in the event of the acceptance actually reaching the offerer, the door would be opened to the perpetration of much fraud, and, putting aside this consideration, considerable delay in commercial transactions, in which despatch is, as a rule, of the greatest consequence, would be occasioned; for the acceptor would never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance had reached its destination.

Upon balance of conveniences and inconveniences it seems to me, applying with slight alterations the language of the Supreme Court of the United States in *Taylor v. Merchants' Fire Insurance Co.*,¹ more consistent with the acts and declarations of the parties in this case to consider the contract complete and absolutely binding on the transmission of the notice of allotment through the post, as the medium of communication that the parties themselves contemplated, instead of postponing its completion until the notice had been received by the defendant. Upon principle, therefore, as well as authority, I think that the judgment of Lopes, J., was right and should be affirmed, and that this appeal should therefore be dismissed.

BAGGALLAY, L.J. I am of opinion that this appeal should be dismissed.

It has been established by a series of authorities, including *Dunlop v. Higgins*, in the House of Lords,² and *Harris's Case*,³ in the Court of Appeal in Chancery, that if an offer is made by

¹ Howard S. Ct. Rep. 390.

² 1 H. L. C. 381.

³ Law Rep. 7 Ch. 587

letter, which expressly or impliedly authorizes the sending of an acceptance of such offer by post, and a letter of acceptance properly addressed is posted in due time, a complete contract is made at the time when the letter of acceptance is posted, though there may be delay in its delivery.

The question involved in the present appeal is, whether the same principle should be applied in a case in which the letter of acceptance, though duly posted, is not delivered to the person to whom it is addressed. Lopes, J., was of opinion that the principle was applicable to such a case, and gave judgment in favor of the plaintiffs, and from such judgment the present appeal is brought.

In support of his appeal the defendant relies upon the decisions of the Court of Exchequer in the case of the British and American Telegraph Co. v. Colson,¹ to which, for conciseness, I will refer as Colson's Case.² I propose to consider Dunlop v. Higgins³ and Colson's Case⁴ and Harris's Case⁵ somewhat in detail, for the purpose of ascertaining whether the decision of the Court of Exchequer in Colson's Case⁶ is consistent with the decisions of the House of Lords and of the Lords Justices in the other two cases, and with the principles upon which such decisions were based.

The circumstances of Dunlop v. Higgins⁷ were as follows : After a preliminary correspondence Messrs. Dunlop & Co., who were merchants at Glasgow, addressed a letter on January 28th, 1845, to Messrs. Higgins & Co., who carried on business at Liverpool, offering them 2000 tons of iron pigs at 65s. per ton net. This letter reached Higgins & Co. at 8 A.M. on January 30th, and on the same day they replied by letter duly addressed to Dunlop & Co. in the following terms : " We will take the 2000 tons pigs you offer us."

It appeared by the evidence that the first post for Glasgow, after the receipt by Higgins & Co. of the letter of Dunlop & Co. left Liverpool at 3 P.M. on the 30th, and that the post next following left at 1 A.M. of the 31st, and also that a letter despatched by the former post would in due course arrive at Glasgow at 2 P.M. on the 31st, and by the latter in time to be delivered at 8 A.M. on February 1st. The letter so sent by Higgins & Co. was posted after the bags were made up for the 3 P.M. post, and was despatched by the 1 A.M. post on the 31st. In due course it should have been delivered in Glasgow at

¹ Law Rep. 7 Ex. 108.

² *Ibid.*

³ 1 H. L. C. 381.

⁴ Law Rep. 7 Ex. 108.

⁵ Law Rep. 7 Ch. 587.

⁶ Law Rep. 7 Ex. 108.

⁷ 1 H. L. C. 381.

8 A.M. on February 1st, but it was not, in fact, delivered until 2 P.M. on that day, the frosty state of the weather having prevented the train from Liverpool arriving at Warrington in time to meet the down train to Glasgow. It appeared also that Higgins & Co., by mistake, dated their letter as of January 31st instead of January 30th. On February 1st, after the receipt of the letter of Higgins & Co. accepting the offer, Dunlop & Co. wrote to Higgins & Co. : "We have your letter of yesterday's date, but are sorry that we cannot now enter the 2000 tons, our offer not being accepted in time." The iron was not delivered, and Higgins & Co. brought their action for breach of contract. The defence of Dunlop & Co. was that their letter of the 28th should have been answered by the first post—viz., by that which left Liverpool at 3 P.M. on the 30th, but that at any rate they were not bound to wait for a third post delivered at Glasgow at 2 P.M. on February 1st.

On the trial before the Lord Justice General, he admitted evidence to show that the letter of acceptance, though dated the 31st, was in fact written and posted on January 30th, and he directed the jury that if Higgins & Co. posted their acceptance of the offer in due time, according to the usage of trade, they were not responsible for any casualties in the post-office establishment.

It is important to bear in mind the terms of this direction, as it formed the substantial subject of appeal, first to the Court of Session and thence to the House of Lords. The jury found for the plaintiffs—that is to say, they found as a fact that the letter of Higgins & Co. was posted in due time according to the usage of the parties in their business transactions, and having so found, they, under the direction of the judge, gave their verdict for the plaintiffs. Exceptions were therefore taken by the defendants, and, among other grounds of exception, they objected to the admission of evidence as to the posting of the letter on January 30th, and to the direction of the Lord Justice General, to which I have just referred. The exceptions were overruled by the judges of the First Division, and from their decision the defendants appealed to the House of Lords; the appeal was dismissed, and the ruling and direction of the Lord Justice General were upheld.

Though the question in dispute between the parties was whether Higgins & Co. were responsible for the delay in the delivery of the post, it is observed that the direction of the judge went further, for he ruled that if their letter was duly posted they were not responsible for any casualties in the post-office establishment. During the argument Lord Cottenham

said : " The question is whether putting in the post is a virtual acceptance, though by the accident of the post it does not arrive ;" and, in moving the judgment of the House, he observed : " If a man does all that he can do, that is all that is called for ; if there is a usage of trade to accept such an offer and to forward it by means of the post, and if the party accepting the offer puts his letter into the post on the correct day, has he not done everything he was bound to do ; how can he be responsible for that over which he has no control ?" There is nothing in the language of Lord Cottenham to suggest any distinction between a case in which there is delay in the delivery of the letter and one in which the letter is not delivered at all. But Lord Cottenham went on to illustrate his meaning, and did so in the following terms : " It is a very frequent occurrence that a party having a bill of exchange which he tenders for payment to the acceptor, and acceptance is refused, is bound to give the earliest notice to the drawer. That person may be resident many miles distant from him ; if he puts a letter into the post at the right time it has been held quite sufficient ; he has put the letter into the post, and whether that letter be delivered or not is a matter quite immaterial, because for accidents happening at the post-office he is not responsible." Having regard to the passages in Lord Cottenham's judgment, it appears to me impossible to doubt that the proposition which he intended to affirm, and which was, in fact, his *ratio decidendi*, was this, that when the letter accepting the offer was duly posted, the contract was complete, although it might be delayed in its delivery or might never reach the hands of the party making the offer.

I desire, however, to guard myself against being considered as participating in a view of the effect of the decision in *Dunlop v. Higgins*¹ which has been sometimes adopted, and as I think without sufficient reason—viz., that in all cases in which an offer is accepted by a letter addressed to the party making the offer and duly posted, there is a binding contract from the time when such letter is posted. I do not take this view of the effect of the decision in *Dunlop v. Higgins*.² On the contrary, I think that the principle established by that case is limited in its application to cases in which by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized. In *Dunlop v. Higgins*³ the previous correspondence between the two firms was, in my opinion, quite

¹ 1 H. L. C. 381.

² *Ibid.*

³ *Ibid.*

sufficient, not only to authorize the sending of the acceptance by post, but to point to it as the only mode in which, under the circumstances, such acceptance could be communicated, and it was in consequence of the jury finding it as a fact that Higgins & Co. posted their acceptance of the offer to Dunlop & Co. in due time, according to the usage of their business transactions, that they found a verdict for the plaintiffs under the direction of the judge. The principle involved in *Dunlop v. Higgins*¹ was recognized by Cresswell, J., upon the trial of the action in *Duncan v. Topham*;² upon that occasion he directed the jury that, if the letter accepting the contract was put into the post-office and lost through the negligence of the post-office authorities, the contract would nevertheless be complete; and upon an application in the same case, to make absolute a rule which had been obtained for a new trial, though the new trial was ordered upon other grounds, Wilde, C.J., and Maule, J., expressed views to the same effect as the direction of Cresswell, J.; in that case the letter never reached the hands of the person to whom it was addressed.

I proceed to consider the circumstances of Colson's Case;³ they were as follows. On February 13th, 1867, the defendant sent an application to the company, through the post, for an allotment of fifty shares, undertaking by his letter to pay the sum of £2 per share on whatever number should be allotted to him; on the 15th of the same month fifty shares were allotted to him, and a letter informing him of such allotment was posted to his address, as given in his letter of application for shares—viz., 31 Charlotte Street, Fitzroy Square.

Now a letter of application for shares in a public company, expressed in the usual form, must, I think, having regard to the usage in such matters, be considered as authorizing the acceptance of the offer by a letter through the post, as was expressed by Lopes, J., in the case now under consideration; such would be the ordinary mode of transmission of an allotment letter. The defendant, however, swore, and there was no reason to doubt the truth of his statement, that he never received the letter of allotment; that another person of the same name lived opposite to him in the same street; about that time the numbers in the street were changed, his own being altered from 31 to 87; and that several letters then sent to him had never reached him. On February 28th the plaintiffs, on being informed that the letter of allotment had not reached the defendant, sent him a duplicate, which he refused to accept; the action was then brought by the company to recover the £2 per

¹ 1 H. L. C. 381.² 8 C. B. 225.³ Law Rep. 7 Ex. 108.

share. The jury found that the letter of allotment was posted to the defendant on February 14th, but that he never received it, and that the second notice was not sent in a reasonable time. The learned judge, Bramwell, B., thereupon directed the verdict to be entered for the plaintiffs, but gave the defendant leave to move to have it entered for himself on the authority of *Finucane's Case*,¹ which had recently been decided by Lord Romilly. A rule *nisi* was accordingly obtained, and cause was shown on November 17th, 1870, the Court being composed of the Lord Chief Baron and Bramwell and Pigott, BB. Judgment was reserved, and on January 31st, 1871, the rule was made absolute to enter the verdict for the defendant.

The Lord Chief Baron, in the course of his judgment, expressed himself as follows : " It appears to me that if one proposes to another by a letter through the post to enter into a contract for the sale or purchase of goods, or, as in this case, of shares in a company, and the proposal is accepted by letter and the letter put into the post, the party having proposed to contract is not bound by the acceptance of it until the letter of acceptance is delivered to him, or otherwise brought to his knowledge, except in certain cases where the non-receipt of the acceptance has been occasioned by his own act or default." Now, unless the proposition so put by the Lord Chief Baron is to be read with some qualifications, it can hardly be considered as consistent with the decision in *Dunlop v. Higgins*,² as such decision has ordinarily been understood. The view, however, taken by him of that decision does not appear to be in accordance with that generally taken ; for after alluding to the circumstances of *Dunlop v. Higgins*,³ he proceeded to express his entire concurrence with the decision of the Court of Session and in the affirmance of it by the House of Lords, upon the ground that, in his opinion, the acceptance of the offer reached *Dunlop & Co.* in time, and that the House of Lords had acted upon the same view of the circumstances of the case ; the distinction which he recognized between that case and the one then under consideration consisted in this, that whereas the letter of acceptance in *Dunlop v. Higgins*⁴ was received by the party making the offer in due time, that in *Colson's Case*⁵ never reached its destination. Pigott, B., did not give a separate judgment, but it was stated that he concurred in that of the Lord Chief Baron. Bramwell, B., also commented upon the circumstances of *Dunlop v. Higgins*,⁶ and referred to several passages in the judgment of Lord Cottenham, including those

¹ 17 W. R. 813.

² 1 H. L. C. 381.

³ *Ibid.*

⁴ *Ibid.*

⁵ Law Rep. 7 Ex. 108.

⁶ 1 H. L. C. 381.

which I have quoted, and he then expressed himself as follows : " It seems to me that the correct way to deal with those expressions is to refer them to the subject-matter, and not to consider them as laying down such a proposition as the plaintiffs have contended for, but that when the post may be used between the parties it must be subject to those delays which are unavoidable." It would appear, then, that all the judges in the Court of Exchequer treated the case of *Dunlop v. Higgins*¹ as one decided upon its special circumstances, and as not enunciating any general principle beyond what was necessary for dealing with such circumstances. I am unable to concur in this view. It may be that there were special circumstances in the case of *Dunlop v. Higgins*² sufficient to have justified the decision of the House, irrespective of the application of the principle involved in the direction of the Lord Justice General ; but the decision was not expressed to be based, and apparently was not intended to be based, upon any such ground, but upon an approval and of the direction of that learned judge.

After a careful consideration of the judgments of the Lord Chief Baron and of Mr. Baron Bramwell, I can come to no other conclusion than that the decision in *Colson's Case*³ is inconsistent with that of the House of Lords in *Dunlop v. Higgins*.⁴ If I am right in this conclusion it is not for me to choose between the two ; I am bound by the authority of the decision of the House of Lords.

But I pass on to consider the circumstances of *Harris's Case*,⁵ which came before the Lords Justices in 1872. On March 5th, 1866, Lewis Harris, of Dublin, applied to the directors of the Imperial Land Company of Marseilles, by a letter in the usual form, for an allotment of 200 shares, undertaking by his letter to accept that or any less number of shares that might be allotted to him. The directors allotted to him 100 shares, and early on the morning of March 16th posted a letter to him at his address, as given in his letter of application, which was received by him at Dublin. He had, however, in the interval between the posting and the delivery of the letter giving him notice of the allotment, written to the directors withdrawing his application and declining to accept any shares. Upon an order being made to wind up the company, Mr. Harris was placed upon the list of contributories in respect of the 100 shares, and a summons having been taken out by him to have his name removed from the list, such summons was dismissed by Malins, V.C. From such dismissal Mr. Harris appealed, but the decision of the

¹ 1 H. L. C. 381.

² *Ibid.*

³ Law Rep. 6 Ex. 108.

⁴ 1 H. L. C. 381.

⁵ Law Rep. 7 Ch 587.

Vice-Chancellor was upheld. In giving judgment, James, L.J., said that it appeared to him that the contract was completed the moment the notice of allotment was committed to the post, and a similar view was expressed by Mellish, L.J., who, after referring to the decision of the Court of Exchequer in Colson's Case,¹ and stating that he had great difficulty in reconciling it with that of the House of Lords in *Dunlop v. Higgins*,² observed, with reference to the last-mentioned case, that the real question then before the House of Lords was, whether the ruling of the Lord Justice General was correct, and that the House of Lords held that it was.

It is doubtless true, as was observed by both the Lords Justices, that the decision in Harris's Case³ was not necessarily inconsistent with that of the Court of Exchequer in Colson's Case,⁴ but it is, I think, clear that, although the Lords Justices did not feel themselves called upon to express any dissent from the decision of the Court of Exchequer, as it was not necessary for the decision of the case before them that they should do so, they by no means recognized the propriety of the distinction drawn by the Court of Exchequer between *Dunlop v. Higgins*⁵ and Colson's Case.⁶ I do not think it necessary to refer to Finucane's Case⁷ and other cases decided by Lord Romilly, in which he held that the posting of a letter of allotment which never reached its destination was not sufficient to constitute the applicant a contributory, further than to observe that in Finucane's Case,⁸ *Dunlop v. Higgins*,⁹ and *Duncan v. Topham*¹⁰ were not cited, and that in the others the circumstances were such that the Master of the Rolls deemed himself justified in not following the decision in *Dunlop v. Higgins*.¹¹ Indeed, in one of those cases, Hebb's Case,¹² he distinctly recognized the authority of the decision in *Dunlop v. Higgins*,¹³ which he considered to have been decided upon the ground that the post-office was the common agent of both parties. For the reasons which I have assigned, I am of opinion that the principle established by the decision of the House of Lords in *Dunlop v. Higgins*¹⁴ is applicable to the case now under consideration, and that the decision of Lopes, J., should be affirmed. I desire, however, to add that I have felt myself bound by authority. My own convictions are entirely in accordance with the principles which I consider to have been established by authority; and in saying

¹ Law Rep. 6 Ex. 108.² 1 H. L. C. 381.³ Law Rep. 7 Ch. 587.⁴ Law Rep. 6 Ex. 108.⁵ 1 H. L. C. 381.⁶ Law Rep. 6 Ex. 108.⁷ 17 W. R. 813.⁸ *Ibid.*⁹ 1 H. L. C. 381.¹⁰ 8 C. B. 225.¹¹ 1 H. L. C. 381.¹² Law Rep. 4 Eq. 9.¹³ 1 H. L. C. 381.¹⁴ *Ibid.*

this, I bear in mind as well the very forcible remarks made by the Lord Chief Baron and my present colleague upon the subject of the mischievous consequences that might ensue from an adoption of these principles in certain suggested cases, as equally forcible remarks made by Mellish, L.J., as to the like consequences which would ensue in other cases if those principles were departed from.

BRAMWELL, L.J. The question in this case is not whether the post-office was a proper medium of communication from the plaintiffs to the defendant. There is no doubt that it is so in all cases where personal service is not required. It is an ordinary mode of communication, and every person who gives any one the right to communicate with him gives the right to communicate in an ordinary manner, and so in this way and to this extent, that if an offer were made by letter in the morning to a person at a place within half an hour's railway journey of the offerer, I should say that an acceptance by post, though it did not reach the offerer till the next morning, would be in time. Nor is the question whether, when the letter reaches an offerer, the latter is bound and the bargain made from the time the letter is posted or despatched, whether by post or otherwise. The question in this case is different. I will presently state what in my judgment it is. Meanwhile I wish to mention some elementary propositions which, if carefully borne in mind, will assist in the determination of this case :

First. Where a proposition to enter into a contract is made and accepted, it is necessary, as a rule, to constitute the contract that there should be a communication of that acceptance to the proposer, per Brian, C.J., and Lord Blackburn : *Brogden v. Metropolitan Ry. Co.*¹

Secondly. That the present case is one of proposal and acceptance.

Thirdly. That as a consequence of or involved in the first proposition, if the acceptance is written or verbal—*i.e.*, is by letter or message, as a rule, it must reach the proposer or there is no communication, and so no acceptance of the offer.

Fourthly. That if there is a difference where the acceptance is by a letter sent through the post which does not reach the offerer, it must be by virtue of some general rule or some particular agreement of the parties. As, for instance, there might be an agreement that the acceptance of the proposal may be by sending the article offered by the proposer to be bought, or hanging out a flag or sign to be seen by the offerer as he goes by, or leaving a letter at a certain place, or any other agreed

¹ 2 App. Cas. at p. 692.

mode, and in the same way there might be an agreement that dropping a letter in a post pillar-box or other place of reception should suffice.

Fifthly. That as there is no such special agreement in this case, the defendant, if bound, must be bound by some general rule which makes a difference when the post-office is employed as the means of communication.

Sixthly. That if there is any such general rule applicable to the communication of the acceptance of offers, it is equally applicable to all communications that may be made by post. Because, as I have said, the question is not whether this communication may be made by post. If, therefore, posting a letter which does not reach is a sufficient communication of acceptance of an offer, it is equally a communication of everything else which may be communicated by post—*e.g.*, notice to quit. It is impossible to hold, if I offer my landlord to sell him some hay, and he writes accepting my offer, and in the same letter gives me notice to quit, and posts his letter, which, however, does not reach me, that he has communicated to me his acceptance of my offer, but not his notice to quit. Suppose a man has paid his tailor by check or bank-note, and posts a letter containing a check or bank-note to his tailor, which never reaches, is the tailor paid? If he is, would he be if he had never been paid before in that way? Suppose a man is in the habit of sending checks and bank-notes to his banker by post, and posts a letter containing checks and bank-notes, which never reaches. Is the banker liable? Would he be if this was the first instance of a remittance of the sort? In the cases I have supposed, the tailor and banker may have recognized this mode of remittance by sending back receipts and putting the money to the credit of the remitter. Are they liable with that? Are they liable without it? The question then is, Is posting a letter which is never received a communication to the person addressed, or an equivalent, or something which dispenses with it? It is for those who say it is to make good their contention. I ask why is it? My answer beforehand to any argument that may be urged is, that it is not a communication, and that there is no agreement to take it as an equivalent for or to dispense with a communication. That those who affirm the contrary say the thing which is not. That if Brian, C.J., had had to adjudicate on the case, he would deliver the same judgment as that reported. That because a man, who may send a communication by post or otherwise, sends it by post, he should bind the person addressed, though the communication never reaches him, while he would not so bind him if he had sent it by hand, is impos-

sible. There is no reason in it ; it is simply arbitrary. I ask whether any one who thinks so is prepared to follow that opinion to its consequence ; suppose the offer is to sell a particular chattel, and the letter accepting it never arrives, is the property in the chattel transferred ? Suppose it is to sell an estate or grant a lease, is the bargain completed ? The lease might be such as not to require a deed, could a subsequent lessee be ejected by the would-be acceptor of the offer because he had posted a letter. Suppose an article is advertised at so much, and that it would be sent on receipt of a post-office order. Is it enough to post the letter ? If the word " receipt " is relied on, is it really meant that that makes a difference ? If it should be said let the offerer wait, the answer is, may be he may lose his market meanwhile. Besides, his offer may be by advertisement to all mankind. Suppose a reward for information, information posted does not reach, some one else gives it and is paid, is the offerer liable to the first man ?

It is said that a contrary rule would be hard on the would-be acceptor, who may have made his arrangements on the footing that the bargain was concluded. But to hold as contended would be equally hard on the offerer, who may have made his arrangements on the footing that his offer was not accepted ; his non-receipt of any communication may be attributable to the person to whom it was made being absent. What is he to do but to act on the negative, that no communication has been made to him ? Further, the use of the post-office is no more authorized by the offerer than the sending an answer by hand, and all these hardships would befall the person posting the letter if he sent it by hand. Doubtless in that case he would be the person to suffer if the letter did not reach its destination. Why should his sending it by post relieve him of the loss and cast it on the other party. It was said, if he sends it by hand it is revocable, but not if he sends it by post, which makes the difference. But it is revocable when sent by post, not that the letter can be got back, but its arrival might be anticipated by a letter by hand or telegram, and there is no case to show that such anticipation would not prevent the letter from binding. It would be a most alarming thing to say that it would. That a letter honestly but mistakenly written and posted must bind the writer if hours before its arrival he informed the person addressed that it was coming, but was wrong and recalled ; suppose a false but honest character given, and the mistake found out after the letter posted, and notice that it was wrong given to the person addressed.

Then, as was asked, is the principle to be applied to tele-

grams? Further, it seems admitted that if the proposer said, "Unless I hear from you by return of post the offer is withdrawn," that the letter accepting it must reach him to bind him. There is, indeed, a case recently reported in the *Times*, before the Master of the Rolls, where the offer was to be accepted within fourteen days, and it is said to have been held that it was enough to post the letter on the 14th, though it would and did not reach the offerer till the 15th. Of course there may have been something in that case not mentioned in the report. But as it stands it comes to this, that if an offer is to be accepted in June, and there is a month's post between the places, posting the letter on June 30th will suffice, though it does not reach till July 31st; but that case does not affect this. There the letter reached, here it has not. If it is not admitted that "unless I hear by return the offer is withdrawn" makes the receipt of the letter a condition, it is to say an express condition goes for naught. If it is admitted, is it not what every letter says? Are there to be fine distinctions, such as, if the words are "unless I hear from you by return of post," etc., it is necessary the letter should reach him, but "let me know by return of post," it is not; or if in that case it is, yet it is not where there is an offer without those words. Lord Blackburn says that Mellish, L.J., accurately stated that where it is expressly or impliedly stated in the offer, "you may accept the offer by posting a letter," the moment you post this letter the offer is accepted. I agree; and the same thing is true of any other mode of acceptance offered with the offer and acted on—as firing a cannon, sending off a rocket, give your answer to my servant the bearer. Lord Blackburn was not dealing with the question before us; there was no doubt in the case before him that the letter had reached. As to the authorities, I shall not re-examine those in existence before the *British and American Telegraph Co. v. Colson*.¹ But I wish to say a word as to *Dunlop v. Higgins*;² the whole difficulty has arisen from some expressions in that case. Mr. Finlay's argument and reference to the case when originally in the Scotch Court has satisfied me that *Dunlop v. Higgins*³ decided nothing contrary to the defendant in this case. Mellish, L.J., in *Harris's Case*,⁴ says: "That case is not a direct decision on the point before us." It is true, he adds, that he has great difficulty in reconciling the case of the *British and American Telegraph Co. v. Colson*⁵ with *Dunlop v. Higgins*.⁶ I do not share that difficulty. I think they are perfectly reconcilable, and that I have shown so.

¹ Law Rep. 6 Ex. 108.² *Ibid.*³ Law Rep. 6 Ex. 108.² 1 H. L. C. 381.⁴ Law Rep. 7 Ch. 596.⁵ 1 H. L. C. 381.

Where a posted letter arrives, the contract is complete on the posting. So where a letter sent by hand arrives, the contract is complete on the writing and delivery to the messenger. Why not? All the extraordinary and mischievous consequences which the Lord Justice points out in *Harris's Case*¹ might happen if the law were otherwise when a letter is posted, would equally happen where it is sent otherwise than by the post. He adds that the question before the Lords in *Dunlop v. Higgins*² was whether the ruling of the Lord Justice Clerk was correct, and they held it was. Now Mr. Finlay showed very clearly that the Lord Justice Clerk decided nothing inconsistent with the judgment in the *British and American Telegraph Co. v. Colson*.³ Since the last case there have been two before Vice-Chancellor Malins, in the earlier of which he thought it "reasonable," and followed it. In the other, because the Lord Justices had in *Harris's Case*⁴ thrown cold water on it, he appears to have thought it not reasonable. He says, suppose the sender of a letter says, "I make you an offer, let me have an answer by return of post." By return the letter is posted, and A. has done all that the person making the offer requests. Now that is precisely what he has not done. He has not let him "have an answer." He adds there is no default on his part. Why should he be the only person to suffer? Very true. But there is no default in the other, and why should he be the only person to suffer? The only other authority is the expression of opinion by Lopes, J., in the present case. He says the proposer may guard himself against hardship by making the proposal expressly conditioned on the arrival of the answer within a definite time. But it need not be express nor within a definite time. It is enough that it is to be inferred that it is to be, and if it is to be it must be within a reasonable time. The mischievous consequences he points out do not follow from that which I am contending for. I am at a loss to see how the post-office is the agent for both parties. What is the agency as to the sender? merely to receive? But suppose it is not an answer, but an original communication. What then? Does the extent of the agency of the post-office depend on the contents of the letter? But if the post-office is the agent of both parties, then the agent of both parties has failed in his duty, and to both. Suppose the offerer says, "My offer is conditional on your answer reaching me." Whose agent is the post-office then? But how does an offerer make the post-office his agent, because he gives the offeree an option of using that or any other means of communication?

¹ Law Rep. 7 Ch. 596.³ Law Rep. 6 Ex. 108.² 1 H. L. C. 381.⁴ Law Rep. 7 Ch. 596.

I am of opinion that this judgment should be reversed. I am of opinion that there was no bargain between these parties to allot and take shares, that to make such bargain there should have been an acceptance of the defendant's offer and a communication to him of that acceptance. That there was no such communication. That posting a letter does not differ from other attempts at communication in any of its consequences, save that it is irrevocable as between the poster and post-office. The difficulty has arisen from a mistake as to what was decided in *Dunlop v. Higgins*,¹ and from supposing that because there is a right to have recourse to the post as a means of communication, that right is attended with some peculiar consequences, and also from supposing that because if the letter reaches it binds from the time of posting, it also binds though it never reaches. Mischief may arise if my opinion prevails. It probably will not, as so much has been said on the matter that principle is lost sight of. I believe equal if not greater, will, if it does not prevail. I believe the latter will be obviated only by the rule being made nugatory by every prudent man saying, "Your answer by post is only to bind if it reaches me." But the question is not to be decided on these considerations. What is the law? What is the principle? If Brian, C.J., had had to decide this, a public post being instituted in his time, he would have said the law is the same, now there is a post, as it was before—viz., a communication to affect a man must be a communication—*i.e.*, must reach him.

Judgment affirmed.²

¹ 1 H. L. C. 381.

² *Vassar v. Camp*, 11 N. Y. 441, accord.

The fact that there was a valid contract has been found by the referee. The evidence showed that a proposal, in writing, was made by Mr. Daly to the plaintiff for an engagement of her services for the year 1869. The plaintiff testifies that she signed an acceptance on Saturday, April 13th, 1870, and placed it in the letter-box of the defendant, at the theatre. The defendant admits that this letter-box was sometimes used as a place for deposit of the duplicates of contracts made between him and the actors. It is true that he testified that he never received the papers which the plaintiff asserts that she deposited in the box. This, however, is immaterial. The minds of the parties met when the plaintiff complied with the usual, or even occasional, practice, and left the acceptance in a place of deposit recognized as such by the defendant. This doctrine is analogous to that which has been adopted in the case of communication by letter or by telegraph. (*Vassar v. Camp*, 11 N. Y. 441; *Trevor v. Wood*, 36 id. 307.) The principle governing these cases is, that there is a concurrence of the minds of the parties upon a distinct proposition, manifested by an overt act. (*White v. Corlies*, 46 N. Y. 467.) The deposit in the box, under the circumstances of the present case, is such an act.—*Dwight, C., Howard v. Daly*, 61 N. Y. 362, 365, 366.—ED.

JOHN B. TREVOR, JR., AND JAMES B. COLGATE, APPELLANTS, v. JOHN WOOD, GEORGE W. WOOD, AND JAMES CULLEN, RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, MARCH, 1867.

[*Reported in 36 New York Reports 307.*]

APPEAL from a judgment of the Supreme Court rendered at General Term, in the first district, reversing a judgment entered upon the report of Hon. William Mitchell, referee, and ordering a new trial before the same referee.

The appellants have stipulated that if the judgment be affirmed, judgment absolute may be entered against them.

The appellants are dealers in bullion in New York, and the respondents are dealers in bullion in New Orleans. In 1859 they agreed to deal with each other in the purchase and sale of dollars, and that all communications between them in reference to such transactions should be by telegraph.

On January 30th, 1860, the appellants telegraphed from New York to the respondents, at New Orleans, asking at what price they would sell 100,000 Mexican dollars. On the 31st of the same month the respondents answered that they would deliver 50,000 at $7\frac{1}{4}$; and on the same day the appellants telegraphed from New York to the defendants, at New Orleans, as follows :

“ TO JOHN WOOD & Co.:

“ Your offer, 50,000 Mexicans at $7\frac{1}{4}$, accepted ; send more if you can.

TREVOR & COLGATE.”

At the same time the appellants sent by mail to the respondents a letter acknowledging the receipt of the respondents' telegram, and copying the appellants' telegraphic answer. On the same day the respondents had also sent by mail a letter to the appellants, copying respondents' telegram of that date. On the next day (February 1st, 1860) the appellants again telegraphed to the respondents as follows :

“ TO JOHN WOOD & Co. :

“ Accepted by telegraph yesterday, your offer for 50,000 Mexicans ; send as many more, same price. Reply.

“ TREVOR & COLGATE.”

This telegram, as well as that of January 31st, from the appellants, did not reach the respondents until 10 A.M. on February 4th, 1860, in consequence of some derangement in a part

of the line used by the appellants, but which was not known to the appellants until February 4th, when the telegraph company reported the line down. On February 3d the respondents telegraphed to the appellants as follows : " No answer to our despatch—dollars are sold." And on the same day they wrote by mail to the same effect. The appellants received this despatch on the same day, and answered it on the same day as follows :

“TO JOHN WOOD & CO. :

"Your offer was accepted on receipt."

And again the next day :

“The dollars must come, or we will hold you responsible.
Reply. TREVOR & COLGATE.”

And again on February 4th insisting on the dollars being sent "by this or next steamer," and saying, "Don't fail to send the dollars at any price."

On the same February 4th the respondents telegraphed to appellants: "No dollars to be had. We may ship by steamer twelfth, as you propose, if we have them." No dollars were sent, and this action was brought to recover damages for an alleged breach of contract in not delivering them. The referee found for the plaintiff \$219.33.

George Thompson for the appellant.

IV. Z. *Larneo* for the respondent.

SCRUGHAM, J. The offer of the respondents was made on January 31st, and they did not attempt to revoke it until February 3d. The offer was accepted by the appellants before, but the respondents did not obtain knowledge of the acceptance until after this attempted revocation. The principal question, therefore, which arises in the case, is whether a contract was created by this acceptance before knowledge of it reached the respondents.

The case of *Mactier v. Frith*, in the late Court of Errors (6 Wend. 103), settles this precise question, and was so regarded by this Court in *Vassar v. Camp* (1 Kern. 432), where it is said that the principle established in the case of *Mactier v. Frith* was that it was only necessary "that there should be a concurrence of the minds of the parties upon a distinct proposition manifested by an overt act; and that the sending of a letter announcing a consent to the proposal was a sufficient manifestation and consummated the contract from the time it was sent."

There is nothing in either the case of *Mactier v. Frith* nor in that of *Vassar v. Camp*, indicating that this effect is given to

the sending of a letter, because it is sent by mail through the public post-office, and in fact the letter referred to in the first case could not have been so sent, for it was to go from the city of New York to Jacmel, in the island of St. Domingo, between which places there was at that time no communication by mail.

The sending of a letter accepting the proposition is regarded as an acceptance, because it is an overt act clearly manifesting the intention of the party sending it to close with the offer of him to whom it is sent, and thus marking that *aggregatio mentium* which is necessary to constitute a contract.¹

It was agreed between these parties that their business should be transacted through the medium of the telegraph. The object of this agreement was to substitute the telegraph for other methods of communication, and to give to their transactions by it the same force and validity they would derive if they had been performed through other agencies. In accordance with this agreement the offer was made by telegraph to the appellants in New York, and the acceptance addressed to the respondents in New Orleans, and immediately despatched from New York by order of the appellants. It cannot, therefore, be said that the appellants did not put their acceptance in a proper way to be communicated to the respondents, for they adopted the method of communication which had been used in the transaction by the respondents, and which had been selected by prior agreement between them as that by means of which their business should be transacted.

Under these circumstances the sending of the despatch must be regarded as an acceptance of the respondents' offer, and thereupon the contract became complete.

I cannot conceive upon what principle an agreement to communicate by telegraph can be held to be in effect a warranty by each party that his communication to the other shall be received. On the contrary, by agreeing beforehand to adopt that means of communication the parties mutually assume its hazards, which are principally as to the prompt receipt of the despatches.

The referee finds as a fact that the respondents answered the telegram of the appellants asking at what price they would sell 100,000 Mexican dollars by another telegram as follows :

“TREVOR & COLGATE, New York :

“Will deliver 50,000 at $7\frac{1}{4}$ per Moses Taylor. Answer.

“JOHN WOOD & Co.”

It was proved on the trial that this telegram was sent by the

¹ A quotation from the opinion in *Mactier v. Frith* has been omitted.—ED.

respondents, and a letter of the same date, signed by them, repeating the telegram and stating that they had sent it, was read in evidence.

This affords sufficient evidence of subscription by the respondents to take the case out of the Statute of Frauds.

The judgment should be reversed.

All the judges concurring, except BOCKES and GROVER, JJ., who concurred only in the result.

Judgment reversed.

HENTHORN v. FRASER.

IN THE COURT OF APPEAL, MARCH 3, 1892.

[*Reported in Law Reports 2 Chancery (1892) 27.*]

IN 1891 the plaintiff was desirous of purchasing from the Huskisson Benefit Building Society certain houses in Flamank Street, Birkenhead. In May he, at the office of the society in Chapel Street, Liverpool, signed a memorandum drawn up by the secretary, offering £600 for the property, which offer was declined by the directors; and on July 1st he made in the same way an offer of £700, which was also declined. On July 7th he again called at the office, and the secretary verbally offered to sell to him for £750. This offer was reduced into writing, and was as follows:

"I hereby give you the refusal of the Flamank Street property at £750 for fourteen days."

The secretary, after signing this, handed it to the plaintiff, who took it away with him for consideration.

On the morning of the 8th another person called at the office, and offered £760 for the property, which was accepted, and a contract for purchase signed, subject to a condition for avoiding it if the society found that they could not withdraw from the offer to the plaintiff.

Between 12 and 1 o'clock on that day the secretary posted to the plaintiff, who resided in Birkenhead, the following letter:

"Please take notice that my letter to you of the 7th instant, giving you the option of purchasing the property, Flamank Street, Birkenhead, for £750, in fourteen days, is withdrawn, and the offer cancelled."

This letter, it appeared, was delivered at the plaintiff's address between 5 and 6 in the evening, but, as he was out, did not reach his hands till about 8 o'clock.

On the same July 8th the plaintiff's solicitor, by the plaintiff's direction, wrote to the secretary as follows :

" I am instructed by Mr. James Henthorn to write you, and accept your offer to sell the property, 1 to 17 Flamank Street, Birkenhead, at the price of £750. Kindly have contract prepared and forwarded to me."

This letter was addressed to the society's office, and was posted in Birkenhead at 3.50 P.M., was delivered at 8.30 P.M. after the closing of the office, and was received by the secretary on the following morning. The secretary replied, stating that the society's offer had been withdrawn.

The plaintiff brought this action in the Court of the County Palatine for specific performance. The Vice-Chancellor dismissed the action, and the plaintiff appealed.

Farwell, Q.C., and *T. R. Hughes* for the appeal.

Neville, Q.C., and *P. O. Lawrence* for the defendant.

We submit that the Vice-Chancellor has drawn a correct inference—that there was no authority to accept by post ; and if that be so, the acceptance will not date from the posting. *Dunlop v. Higgins*¹ went on the ground that it was the understanding of both parties that an answer should be sent by post. In *Brogden v. Metropolitan Railway Company*, Lord Blackburn puts it on the ground " that where it is expressly or impliedly stated in the offer that you may accept the offer by posting a letter, the moment you post the letter the offer is accepted." It would be very inconvenient to hold the post admissible in all cases. Here, Liverpool and Birkenhead are at such a short distance from each other, that it cannot be considered that the plaintiff had an authority to reply by post. If the offer had been sent by post, that would, no doubt, be held to give an authority to reply by post ; but the offer was delivered by hand to the plaintiff, who was in the habit of calling at the defendants' office, and lived only at a short distance, so that authority to reply by post cannot be inferred. The post is not prohibited ; the acceptance may be sent in any way ; but, unless sending it by post was authorized, it is inoperative till it is received. Suppose, immediately after posting the acceptance, the plaintiff had gone to the office and retracted it, surely he would have been free.

[LORD HERSCHELL. It is not clear that he would, after sending an acceptance in such a way that he could not prevent its reaching the other party. Possibly a case where the question is as to the date from which an acceptance which has been re-

¹ 1 H. L. C. 381.

ceived is operative may not stand on precisely the same footing as one where the question is whether the person making the offer is bound, though the acceptance has never been received at all. More evidence of authority to accept by post may be required in the latter case than in the former.]

Dickinson v. Dodds¹ shows that a binding contract to sell to another person may be made while an offer is pending, and that it will be a withdrawal of the offer.

[LORD HERSCHELL. In that case the person to whom the offer was made knew of the sale before he sent his acceptance.]

Farwell in reply.

LORD HERSCHELL. This is an action for the specific performance of a contract to sell to the plaintiff certain house property situate in Flamank Street, Birkenhead. The action was tried before the Vice-Chancellor of the County Palatine of Lancashire, who gave judgment for the defendants. On July 7th, 1891, the secretary of the building society whom the defendants represent handed to the plaintiff, in the office of the society at Liverpool, a letter in these terms: "I hereby give you the refusal of the Flamank Street property at £750 for fourteen days." It appears that the plaintiff had been for some time in negotiation for the property, and had on two previous occasions made offers for the purchase of it, which were not accepted by the society. These offers were made by means of letters, written by the secretary in the office of the society, and signed by the plaintiff there. The plaintiff resided in Birkenhead, and he took away with him to that town the letter of July 7th containing the offer of the society. On July 8th a letter was posted in Birkenhead at 3.50 P.M., written by his solicitor accepting on his behalf the offer to sell the property at £750. This letter was not received at the defendants' office until 8.30 P.M., after office hours, the office being closed at 6 o'clock. On the same day a letter was addressed to the plaintiff by the secretary of the building society in these terms: "Please take notice that my letter to you of the 7th inst. giving you the option of purchasing the property, Flamank Street, Birkenhead, for £750, in fourteen days, is withdrawn and the offer cancelled." This letter was posted in Liverpool between 12 and 1 P.M., and was received in Birkenhead at 5.30 P.M. It will thus be seen that it was received before the plaintiff's letter of acceptance had reached Liverpool, but after it had been posted. One other fact only need be stated. On July 8th the secretary of the building society sold the same premises to Mr. Miller for the sum of £760, but the receipt for the deposit paid in respect of

¹ 2 Ch. D. 463.

the purchase stated that it was subject to being able to withdraw the letter to Mr. Henthorn giving him fourteen days' option of purchase.

If the acceptance by the plaintiff of the defendants' offer is to be treated as complete at the time the letter containing it was posted, I can entertain no doubt that the society's attempted revocation of the offer was wholly ineffectual. I think that a person who has made an offer must be considered as continuously making it until he has brought to the knowledge of the person to whom it was made that it is withdrawn. This seems to me to be in accordance with the reasoning of the Court of King's Bench in the case of *Adams v. Lindsell*,¹ which was approved by the Lord Chancellor in *Dunlop v. Higgins*,² and also with the opinion of Lord Justice Mellish in *Harris's Case*.³ The very point was decided in the case of *Byrne v. Van Tienhoven*⁴ by Lord Justice Lindley, and his decision was subsequently followed by Mr. Justice Lush. The grounds upon which it has been held that the acceptance of an offer is complete when it is posted have, I think, no application to the revocation or modification of an offer. These can be no more effectual than the offer itself, unless brought to the mind of the person to whom the offer is made. But it is contended on behalf of the defendants that the acceptance was complete only when received by them and not on the letter being posted. It cannot, of course, be denied, after the decision in *Dunlop v. Higgins*⁵ in the House of Lords, that, where an offer has been made through the medium of the post, the contract is complete as soon as the acceptance of the offer is posted, but that decision is said to be inapplicable here, inasmuch as the letter containing the offer was not sent by post to Birkenhead, but handed to the plaintiff in the defendants' office at Liverpool. The question therefore arises in what circumstances the acceptance of an offer is to be regarded as complete as soon as it is posted. In the case of the *Household Fire and Carriage Accident Insurance Company v. Grant*,⁶ Lord Justice Baggallay said :⁷ " I think that the principle established in *Dunlop v. Higgins* is limited in its application to cases in which by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized." And in the same case Lord Justice Thesiger based his judgment⁸ on the defendant having made an applica-

¹ 1 B. & Al. 681.

⁴ 5 C. P. D. 344.

⁷ *Ibid.*, 227.

² 1 H. L. C. 381, 399.

⁵ 1 H. L. C. 381.

⁸ 4 Ex. D. 218.

³ Law Rep. 7 Ch. 587.

⁶ 4 Ex. D. 216.

tion for shares under circumstances "from which it must be implied that he authorized the company, in the event of their allotting to him the shares applied for, to send the notice of allotment by post." The facts of that case were that the defendant had, in Swansea, where he resided, handed a letter of application to an agent of the company, their place of business being situate in London. It was from these circumstances that the Lords Justices implied an authority to the company to accept the defendant's offer to take shares through the medium of the post. Applying the law thus laid down by the Court of Appeal, I think in the present case an authority to accept by post must be implied. Although the plaintiff received the offer at the defendants' office in Liverpool, he resided in another town, and it must have been in contemplation that he would take the offer, which by its terms was to remain open for some days, with him to his place of residence, and those who made the offer must have known that it would be according to the ordinary usages of mankind that if he accepted it he should communicate his acceptance by means of the post. I am not sure that I should myself have regarded the doctrine that an acceptance is complete as soon as the letter containing it is posted as resting upon an implied authority by the person making the offer to the person receiving it to accept by those means. It strikes me as somewhat artificial to speak of the person to whom the offer is made as having the implied authority of the other party to send his acceptance by post. He needs no authority to transmit the acceptance through any particular channel; he may select what means he pleases, the post-office no less than any other. The only effect of the supposed authority is to make the acceptance complete so soon as it is posted, and authority will obviously be implied only when the tribunal considers that it is a case in which this result ought to be reached. I should prefer to state the rule thus: Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted. It matters not in which way the proposition be stated, the present case is in either view within it. The learned Vice-Chancellor appears to have based his decision to some extent on the fact that before the acceptance was posted the defendants had sold the property to another person. The case of *Dickinson v. Dodds*¹ was relied upon in support of that defence. In that case, however, the plaintiff knew of the subse-

¹ 2 Ch. D. 463.

quent sale before he accepted the offer, which, in my judgment, distinguishes it entirely from the present case. For the reasons I have given, I think the judgment must be reversed and the usual decree for specific performance made. The respondents must pay the costs of the appeal and of the action.

LINDLEY, L.J. I quite concur. I am not prepared to accede to the argument that because the offer was not made by post there was no authority to send an acceptance by post, and the Vice-Chancellor, in my opinion, fell into a mistake by acceding to it.

KAY, L.J. On July 7th, 1891, the defendants gave to the plaintiff, who was then in their office in Liverpool, an offer in writing to sell him certain real property at Birkenhead, where the plaintiff resided. The plaintiff had been on several previous occasions at their office on this or like business. He was not able to write beyond signing his name. On July 8th his solicitor wrote by his direction accepting the offer. This letter was posted at 3.50 P.M., and arrived at 8.30 the same evening. This was after office hours, and it was not opened till 10 o'clock next morning. In the mean time the defendants wrote withdrawing their offer on the same July 8th, and posted their letter between 12 and 1 P.M. This was received at 5.30 the same evening. On the same July 8th the defendants entered into a contract to sell the same property to another person with an express condition if they were able to withdraw their offer to the plaintiff.

The question is, was the withdrawal in time or too late.

Dunlop *v.* Higgins¹ has decided that, where a letter sent by post was a proper mode of acceptance, the contract was complete from the time that the letter was posted. In that case the letter was actually received, though, by fault of the post-office, there was some delay in its transmission. Upon receipt of it, the offer was withdrawn. The question was the same as in the present case, except that the withdrawal was after the actual receipt of the acceptance which was treated as being too late. It was held that, by posting the letter in due time, the party by the usage of trade had done all that he was bound to do. He could not be responsible for the delay of the post-office in delivering the letter, and therefore there was from the time of the posting a valid acceptance. It might have still been doubtful whether posting a letter of acceptance in time would amount to an acceptance if the letter was never received. The ordinary rule is, that to constitute a contract there must be an offer, an acceptance, and a communication of that acceptance to the person making the offer: per Lord Blackburn in *Brogden v.*

¹ 1 H. L. C. 381.

Metropolitan Railway Company ;¹ and see per Lord Bramwell.² It may be that where the communication is in fact received, the contract may date back to the time of posting the acceptance, but there is considerable reason for holding that if never received the posting might be treated as a nullity. The point was so decided in *British and American Telegraph Company v. Colson* ;³ and see the judgment of Lord Bramwell in *Household Fire and Carriage Accident Insurance Company v. Grant*. However, in the last-mentioned case, which is a decision binding upon this Court, the Court of Appeal, Bramwell, L.J., dissenting, held, that the posting of a letter of allotment in answer to an application for shares constituted a binding contract to take the shares though the letter of allotment was not received. In his judgment, Thesiger, L.J., refers to the cases in which the

¹ 2 App. Cas. 692.

But when you come to the general proposition which Mr. Justice Brett seems to have laid down, that a simple acceptance in your own mind, without any intimation to the other party, and expressed by a mere private act, such as putting a letter into a drawer, completes a contract, I must say I differ from that. It appears from the Year Books that as long ago as the time of Edward IV.,* Chief Justice Brian decided this very point. The plea of the defendant in that case justified the seizing of some growing crops because he said the plaintiff had offered him to go and look at them, and if he liked them, and would give 2s. 6d. for them, he might take them ; that was the justification. That case is referred to in a book which I published a good many years ago, *Blackburn on Contracts of Sale*,† and is there translated. Brian gives a very elaborate judgment, explaining the law of the unpaid vendor's lien, as early as that time, exactly as the law now stands, and he consequently says : " This plea is clearly bad, as you have not shown the payment or the tender of the money ; " but he goes farther, and says (I am quoting from memory, but I think I am quoting correctly), " moreover, your plea is utterly naught, for it does not show that when you had made up your mind to take them you signified it to the plaintiff, and your having it in your own mind is nothing, for it is trite law that the thought of man is not triable, for even the devil does not know what the thought of man is ; but I grant you this, that if in his offer to you he had said, Go and look at them, and if you are pleased with them signify it to such and such a man, and if you had signified it to such and such a man, your plea would have been good, because that was a matter of fact." I take it, my Lords, that that, which was said three hundred years ago and more, is the law to this day, and it is quite what Lord Justice Mellish in *ex parte Harris*‡ accurately says, that where it is expressly or impliedly stated in the offer that you may accept the offer by posting a letter, the moment you post the letter the offer is accepted. You are bound from the moment you post the letter, not, as it is put here, from the moment you make up your mind on the subject.—Per Lord Blackburn in *Brogden v. Metropolitan Railway Company*, L. R. 2 App. Cas. 666, 692 —Ed.

² 4 Ex. D. 233.

³ Law Rep. 6 Ex. 108.

* 17 Edw. IV., T. Pasch Case, 2.

† Page 190 *et seq.*

‡ Law Rep. 7 Ch. Ap 593

decision in *Dunlop v. Higgins*¹ has been explained by saying that the post-office was treated as the common agent of both contracting parties. That reason is not satisfactory. The post-office are only carriers between them. They are agents to convey the communication, not to receive it. The communication is not made to the post-office, but by their agency as carriers. The difference is between saying "Tell my agent A., if you accept," and "Send your answer to me by A." In the former case A. is to be the intelligent recipient of the acceptance, in the latter he is only to convey the communication to the person making the offer which he may do by a letter, knowing nothing of its contents. The post-office are only agents in the latter sense. All that *Dunlop v. Higgins*² decided was, that the acceptor of the offer having properly posted his acceptance, was not responsible for the delay of the post-office in delivering it; so that after receipt the said party could not rescind on the ground of that delay. I cannot help thinking that the decision has been treated as going much further than the House of Lords intended. Baggallay, L.J., in his judgment in *Household Fire and Carriage Accident Insurance Company v. Grant*,³ treats it as applicable "to cases in which by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized." If for authorized the word "contemplated" is substituted, I should be disposed to agree with this dictum. But I would rather express it thus: "Posting an acceptance of an offer may be sufficient where it can fairly be inferred from the circumstances of the case that the acceptance might be sent by post."

Is that a proper inference in the present case? I think it is. One party resided in Liverpool, the other in Birkenhead. The acceptance would be expected to be in writing, the subject of purchase being real estate. These and the other circumstances to which I have alluded, in my opinion, warrant the inference that both parties contemplated that a letter sent by post was a mode by which the acceptance might be communicated. I think, therefore, that we are bound by authority to hold that the contract was complete at 3.50 P.M. on July 8th, when the letter of acceptance was posted, and before the letter of withdrawal was received.

Then what was the effect of the withdrawal by the letter posted between 12 and 1 the same day, and received in the evening? Did that take effect from the time of posting? It has

¹ 1 H. L. C. 381.

² *Ibid.*

³ 4 Ex. D. 227.

never been held that this doctrine applies to a letter withdrawing the offer. Take the cases alluded to by Lord Bramwell in the *Household Fire and Carriage Accident Insurance Company v. Grant*.¹ A notice by a tenant to quit can have no operation till it comes to the actual knowledge of the person to whom it is addressed. An offer to sell is nothing until it is actually received. No doubt there is the seeming anomaly pointed out by Lord Bramwell that the same letter might contain an acceptance, and also such a notice or offer as to other property, and that when posted it would be effectual as to the acceptance, and not as to the notice or offer. But the anomaly, if it be one, arises from the different nature of the two communications. As to the acceptance, if it was contemplated that it might be sent by post, the acceptor, in Lord Cottenham's language, has done all that he was bound to do by posting the letter, but this cannot be said as to the notice of withdrawal. That was not a contemplated proceeding. The person withdrawing was bound to bring his change of purpose to the knowledge of the said party, and as this was not done in this case till after the letter of acceptance was posted, I am of opinion that it was too late.

The point has been so decided in two cases: *Byrne v. Van Tienhoven*,² and *Stevenson v. McLean*,³ and I agree with those decisions.

Solicitors: *G. Dalby*, Birkenhead; *Miller & Williamson*, Liverpool.

S—— v. F——, D——, AND OTHERS.

COURT OF CASSATION IN FRANCE, SEPTEMBER 1, 1813.

[*Reported in Merlin, Répertoire de Jurisprudence, Tit. Vente, 1. Art. III., No. XI. bis.*]⁴

IN the beginning of January, 1813, D., who was intending to purchase an English license, was at Paris with S. of Havre, who had recently purchased the ship *Elisa* of one M. Filleau.

S. proposed to transfer his bargain to D. for his firm, F., D. & Company.

To induce D. to treat with him, S. declared that he would assume, among other obligations, that of furnishing this vessel with fifteen men, comprising therein two captains and one master of perfectly good repute, and that the vessel should be ready to put to sea February 5th, 1813.

The bargain was not concluded; S. returned to Havre: it

¹ 4 Ex. D. 234.

² 5 C. P. D. 344.

³ 5 Q. B. D. 346.

⁴ This case is reprinted by permission from Langdell's *Cases on Contracts*.—ED.

was agreed that D. should write to him, if he concluded to make the purchase in question.

January 21st, 1813, the Messrs. D. wrote to S. as follows : " You have guaranteed to us to furnish this ship with fifteen men, comprising therein two captains and one master of perfectly good repute, and that the ship shall be ready to put to sea February 5th next. . . . With these several assurances and guaranties, without which we should not treat, since this affair is based entirely on our confidence in your aforesaid assurances and guaranties . . . we consent to assume in your place and stead, the payment to M. Filleau of the price of 55,000 francs,"¹ etc.

S. answered this letter by two others of the 23d, the one written, as he said, in the morning, and the other in the evening ; but they both arrived at Paris on the 25th, at the same moment.

In the first of these letters he said : " The ship was still in my hands when your letter reached me ; it is therefore yours *upon the conditions agreed upon between us*. You can act accordingly. I have only time to address you this word, so that you may receive it to-morrow evening. A longer letter, which I am going to write to you this evening, will reach you Monday morning by the diligence."

In the second letter, after announcing that the definitive act of sale would be passed on the morrow, he added : " The most difficult thing is the crew, with which I have occupied myself since the receipt of your letter. . . . It is very true that I said to you that I could have the ship ready to sail February 5th ; she will be much sooner ; but as to the crew, if you had come to a decision in time, I would have written from Paris to obtain one ; and now it is going to be necessary to send an agent to look for one, and it is scarcely possible that this crew can be at hand at so early a date : I shall leave nothing undone, however, to accomplish it."

To this letter . . . the Messrs. D. replied, by letter of January 25th, that they could not accept the purchase, since S. did not assure them of the provision of a crew of good character, and of two honest and intelligent captains, as he had offered and guaranteed to them, so as to put to sea February 5th, conditions specified in their letter of the 21st, and upon which they had made the purchase of the ship *Elisa* to depend.

The same day, the 25th, S. confirmed his letters of the 23d,

¹ Messrs. D. added : " We shall expect your answer by return of post. . . . Please to deliver your answer to the conductor of the mail, promising him two or three francs."

announcing that the act had been signed on the 25th, that he had received 55,000 francs in drafts, the price of the ship, etc.

S. added that he had sent a man to Ostend, Dunkirk, and Antwerp, for the crew ; that it was necessary to be on the alert ; and that he intended that everything should be ready February 5th, *if it was possible*.

The Messrs. D. replied to this letter the 28th, confirming the positive refusal expressed in that of the 25th. They said they had only consented to the purchase upon the several conditions specified in their letter of the 21st ; and that all the guaranties demanded not having been accorded, they were not bound.

Upon the presentation of the bills drawn by S. to the order of M. Filleau, who had sold the *Elisa*, the Messrs. D. & Co. refused to accept them.

Thereupon Filleau had recourse to S. as the drawer of the bills, and S. commenced proceedings before the Tribunal of Commerce of Havre against F., D. & Co., to enforce his alleged contract with them ; and judgment was there rendered in the plaintiff's favor.

The defendants thereupon appealed to the Court of Appeal of Rouen, where the judgment was reversed ; and from the decree of reversal the original plaintiff appealed to the Court of Cassation.¹

In the latter Court Merlin argued as follows in support of the decree appealed from :

What law has the Court of Appeal of Rouen violated, in declaring that the two letters, for the reason alone that they reached the Messrs. D. at the same time, formed as to them only one indivisible whole ?

It has, they say, violated law 65, D. *de acquirendo rerum dominio*, and law 14, § 17, D. *de furtis*, which decide that a letter addressed to a person ceases to belong to him who wrote it, from the moment when he delivers it to the individual whom the person addressed has charged with receiving it and bringing it to him. Whence it follows that the first letter of January 23d became the property of the Messrs. D. at the very instant that the demandant delivered it to the conductor of the mail, conformably to the direction which the Messrs. D. had given him on that subject ; that from that instant the contract was formed between the Messrs. D. and the demandant ; and that the demandant could neither break it nor modify it by the second letter of the same day. . . .

Assuming that the first letter became the property of the

¹ All details as to the proceedings in the lower courts, and also portions of the argument of Merlin, have been omitted.—ED.

Messrs. D. at the very instant when the demandant delivered it to the person indicated to him for that purpose, would it follow that the Messrs. D., receiving the second letter at the same moment as the first, could not consider it as modifying the consent, pure and simple, given to their propositions by the first, as putting upon that consent a restriction which left them at liberty to reconsider their propositions?

In order to decide this question, let us examine another connected with it: Could the demandant, having written and sent his first letter, revoke its contents before it reached the Messrs. D.; and if, having done so, his revocation had been notified to the Messrs. D. before they received the first letter, could the Messrs. D., on receiving afterward his first letter, adhere to it in spite of him, and force him to execute the bargain to which by his first letter he had given his assent?

The demandant maintains that he could not revoke it; but he maintains it only because the interests of his cause oblige him to do it; and good sense and the most weighty authorities rise up against his assertion. What is a letter missive by which I announce to you that I accept the bargain which you have proposed to me? Nothing else than a dumb agent, which I send to declare to you my acceptance; and it is thus that Cujas considered it in his notes upon the title of the Code, *si quis alteri vel sibi emerit*, when he says: *Epistola non contrahit, sed nunciat dominum contrahere*.

Now it is an elementary maxim that I can recall my agent, so long as he has not executed his mandate.

I can therefore recall the letter which I have addressed to you, so long as it has not reached you, so long as it has not brought to you the words which I had given it in charge for you.

Grant that you are the owner of the material of my letter from the moment when I committed it either to your carrier or to a public messenger, who is the carrier of everybody, at the proper hour. That does not deprive my letter of the character of a dumb agent; it does not consequently prevent me from recalling it before you have received it.

Suppose we look at the letter missive under another aspect; suppose we say, with the demandant, that it is a series of words fixed upon paper; we shall still arrive at the same result.

Indeed, in what sense is it true, as the demandant says, that the words fixed upon the paper in the morning are as distinct from those which were affixed to it in the evening, as the words pronounced at mid-day are distinct from those which are pronounced six hours after?

It is true in this sense, that, if the words fixed upon the paper

in the morning reach the person to whom they are addressed before those which were affixed to it in the evening, those of the evening cannot destroy those of the morning.

But it is false in this sense, that the words fixed upon the paper in the morning preserve their priority over those of the evening, if those of the evening reach the person to whom they are addressed either before those of the morning or at the same time.

Bartolus, whom all the authors have copied in this regard, establishes, upon law 4, D. *de donationibus*, a principle which puts this in the clearest light. A letter, says he, is for the absent to whom it is written what words are addressed to a person present; and he who sends a letter to another is considered as speaking to him as if he was present: *Epistola absenti idem est quod sermo presentibus; et qui mittit alteri litteras, intelligitur præsens præsenti loqui.*

Now it is certain that words addressed to a person present can only bind him who uttered them, so far as the person to whom they were addressed heard them before they were retracted.

It is therefore the same of a letter written to an absent person. This letter, therefore, can only oblige its author, so far as the absent person to whom it is written receives it and reads it, things being still entire.

This is the necessary consequence of the very definition which the demandant gives of a letter missive. A letter missive is only a series of words fixed upon paper; but these words are addressed to an absent person; it is necessary, therefore, in order that they should have their effect, that the absent person to whom they are addressed should understand them; they are, therefore, without effect so far as he to whom they are addressed has not understood them; as they would be without effect if, being addressed to a person present, that person was, from a physical cause, not in a condition to understand them. Now how can an absent person understand the words that are addressed to him? Certainly he can only understand them by reading the letter which contains them. The letter by which I contract an obligation can therefore only fulfil its object so far as I can be supposed to persist, at the moment when it arrives, in the will which I had in writing it. If, therefore, at the moment when my letter arrives, I have already in another way manifested and notified a contrary will, my letter can no longer bind me; it is paralyzed in advance.

That is so true that if, at the moment when my letter arrives, I am no longer able to speak to the person to whom it is ad-

dressed, or to persist in the will which I had in writing it, that will cannot be opposed to me, it cannot produce any effect against me ; and it is upon this foundation that all the doctors teach that if, after having written to a person with whom I was in treaty for a bargain, that I accepted his proposition, I happen to die before my letter reaches that person, there is no contract between him and me.

" *Epistola*," says Surdus, lib. 1, Consilium 136, in accordance with a host of authors whom he cites, "*obligare non potest scribentem, si is decedat antequam ad eum pervenerit cum quo erat contrahendum, quia cum per mortem deficiat scribentis consensus, non potest dici quod ejus scriptura loquatur ; per epistolam enim præsens videtur absenti loqui ; sed mortuus non loquitur ; idè cessat præsumptio seu conjectura.*" . . .

Alexander, lib. 5, Consilium 22, No. 9, professes the same doctrine : "*Epistola*," says he, "*seu scriptura quæ mihi absenti à te dirigitur, non potest acceptari et ratificari per me, mortuo illo scribente seu illo qui scripturam ad me dirigebat. . . . Quia, mortuo eo, non potest dici quod scriptura ejus loquatur.*"

The same language is used by Benvenuttus Straccha, in his treatise *De Mercatura*, title *De Probationibus*, No. 16 : "*Quod diximus litteras quæ inter absentes mittuntur probare, non procedit ubi antequàm ei cui scriptæ sunt litteræ traditæ fuissent, decessisset is qui scripsisset. Cujus rei illa ratio redditur, quia per litteras absens absentem dicitur alloqui ; non ergò dici potest alloqui qui misit, si antequàm traderentur decessit.*"

The same author, in his treatise *De Abjecto*, last part, No. 8, adverts again to this doctrine, and he opposes to it an objection : " Every one agrees," says he, " that he who contracts by letter is considered as binding himself at the moment when he writes ; the contract is therefore perfect on his side at the instant when the letter leaves his hands ; *mittens epistolam consentit eo tempore quo mittit.* But," he answers, " although he who writes a letter obligatory truly consents at the instant when he causes it to start, his consent only binds him because he persists in it up to the moment when his letter reaches its address : *et huic objectioni respondeo quod licet mittens consentiat tempore quo mittit, verum est etiam consentire tempore quo litteræ tradentur, quia durat primus (consensus), et ex quod non reperitur mutata voluntas, præsumitur durare.* And for this reason," continues he, " if death chances to overtake you before the letter by which you oblige yourself to me is delivered to me, your obligation falls, and I cannot avail myself of it against your heirs : *undè si epistola à te missa mihi inscripta est, te mortuo cum mihi traditur, acceptari à me non potest.*"

Baldus upon law 1, D. *Mandati*, explains himself in precisely the same manner: "*Licet mittens consentiat tempore quo mittit, tamen consentit tempore quo epistola pervenit ad eum cui mittitur, quia durat primus consensus; ex quo non reperitur mutatus, voluntas præsumitur durare; et ided puto quod si antequàm perveniat epistola, morietur mittens vel efficiatur furiosus, quod tunc non contrahatur obligatio per epistolam, quia non durat voluntas nec intervenit consensus tunc temporis.*"

Pothier, whom the demandant cites to you as teaching the contrary in his *Traité du Contrat de Vente*, says, however, neither more nor less. After having established that the agreement upon the thing and the price, of which the contract of sale is composed, can take place between the absent by letters, he adds: "In order that the agreement should take place in this case, it is necessary that the will of the party who writes to the other to propose to him the bargain should continue until the time when his letter shall reach the other party, and the latter shall declare that he accepts the bargain." Pothier, therefore, acknowledges very clearly that the consent written in a letter only becomes irrevocable by the delivery of the letter to him for whom it is intended; he acknowledges, therefore, very clearly that, so long as the letter has not reached that person, he who wrote it can revoke its contents.

Be it well observed, moreover, Pothier does not limit his decision to the case where the letter is carried by the messenger of him who wrote it; so far from it, he applies it specially to the case of a letter written from Orleans to Leghorn—that is to say, to a case where correspondence is very seldom carried on except by post, true messenger of the public, and consequently to a case where, by the terms of the Roman laws invoked by the demandant, he to whom a letter is addressed becomes proprietor of it at the instant when the writer parts with it; and therefore it is evident that Pothier, who, according to the expression of the demandant, knew well the text of those laws, himself condemns the inference which the demandant seeks to draw from them.

But, exclaims the demandant, Pothier does not say that it is necessary, for the completion of a contract of sale, that the answer of acceptance should reach the proposer.

No; he does not say it expressly, and why? Because there is no need of saying it, it being understood. And in fact the consent of him who accepts the proposed bargain is of no other nature than the consent of him who makes the proposal; both consents are equally necessary for the completion of the contract. If, therefore, he who proposes is not bound by the propo-

sition, when he retracts it before it has reached its address, he who accepts can no more be bound by his acceptance, when he retracts it before it has reached the author of the proposition.

And here recurs the comparison, which we made just now, of the consent expressed by a letter addressed to an absent person, with the consent expressed by words addressed to a person present.

I find myself in the presence of a deaf person who says to me : Will you buy of me such a thing for such a price ? I answer him : I will ; but he does not hear he ; he declares to me that he has not heard me, and he prays me to give him in writing the answer which he judges, by the movement of my lips, that I have made to him. Then I take a pen and trace for him these words : I said that I would, but on further reflection your proposition is not satisfactory. Could this man pretend that, by the answer which I admit that I made to him *viva voce*, I am bound to him irrevocably ? Certainly not ; and if he prosecuted me, the judge would dismiss him without hesitation.

Wherefore would it be otherwise in the case of a letter written to an absent person ? Because the absent person has become proprietor of my letter from the moment when it left my hands ? But let us take another comparison.

A man has in his cabinet an acoustic vault, constructed in such a manner that, by reason of the various and extremely multiplied windings of the tubes which compose it, the words transmitted through one of the extremities do not reach the other till after a space of five minutes. I am in the presence of that man, and in his cabinet in question. There, after saying to me : Will you buy of me such a thing for such a sum ? he adds : Answer me by my acoustic vault. Thereupon we take our places, I at one of the extremities of his vault, he at the other ; and I say to him by this speaking trumpet : I will. But a minute after I change my resolution ; I run to him, and before he has been able to hear my answer, I say to him : I will not. Could he, after having heard the answer which I made to him at first by his acoustic vault, pretend that this answer having been transmitted to him by tubes of which he was proprietor, and having consequently become his property at the very instant that it left my mouth, I could not retract it before it had struck his ear ? No, emphatically no ; a hundred times no !

For the same reason, the obligation which I contract by a letter to an absent person does not bind me, so long as the absent person to whom I have addressed that letter has not received it.

Therefore, we ought to hold it as very evident that, if the demandant had, before the arrival of the first letter of January 23d, caused a second letter to reach the Messrs. D., by which he had declared to them that he revoked the acceptance which he had made of their propositions by the first, the Messrs. D. would not have had any action against him to compel him to execute the bargain which was negotiating between him and them.

But what the demandant could do by a second letter arriving before the first, could he not do equally by a second letter which, without anticipating the first, reached the Messrs. D. at the same time? Yes, without doubt he could; the two letters arriving together, the Messrs. D. could not say that the consent expressed by the first still subsisted; they could not say that the dumb agent, whom the demandant had sent to them by the first, still had power to manifest to them his consent; they would have been forced to regard the second as taking from the first all credit.

Assuming that, our question resolves itself in the same manner. Since the demandant could, by a second letter arriving at the same time as the first, revoke in a definitive and absolute manner the acceptance contained in the first, it is clear that he could equally, by such second letter, modify that acceptance; that he could equally retract the assurance which he had given by the first, that the crew would be ready by February 5th, and substitute for it a simple promise to do everything in his power to that end; that he could equally restore to a state of negotiation what by the first he had concluded definitively; in a word, that he could equally give to the Messrs. D. the right to reconsider their propositions and retract them.

The decree of the Court was in the following terms:

Considering that the decree attacked has only interpreted a correspondence held between two parties upon commercial agreements, and that, therefore, it has not violated any law, the Court rejects the appeal.

J. H. BLAKE & CO. v. HAMBURG BREMEN FIRE
INSURANCE COMPANY.

IN THE SUPREME COURT OF TEXAS, TYLER TERM, 1886.

[Reported in 67 Texas Reports 160.]

APPEAL from Harris. Tried below before the Hon. James Masterson.

Crank & Taliaferro for appellant.

Hutcheson & Carrington for appellee.

GAINES, A.J. At the time the transactions occurred which gave rise to this litigation, Cotton & Brother were agents representing appellee, and also a large number of other companies doing a business of fire insurance. O. L. Cochran at that time was also an agent of still other insurance companies. Being limited by his principals as to the amount of his risks, he was not able to meet in full the demands of his customers. A written agreement was accordingly entered into between Cotton & Brother, as agents of certain companies represented by them, on the one hand, and Cochran, as agent on the other, stipulating that the former would "cover surplus lines" of insurance for the latter on cotton in certain presses in the city of Houston.

The Insurance Company of North America, the "Traders'," and appellee were each to carry insurance upon cotton in the International Press to the amount of \$5000. It is evident from the written contract and the testimony on the trial, that by the agreement between these parties it was contemplated that when Cochran had a demand for more insurance than he could carry, he should designate by a memorandum in his office the companies named to which it should be apportioned and the amount allotted to each; and that when this was done insurance to the amount so stated was to be considered effected in the respective companies for twenty-four hours, but no longer unless reported by Cochran to Cotton & Brother. There was also an agreement by Cochran with appellees to insure their cotton in the International Press, and it was understood between them that whenever after night appellants should mail a letter to Cochran notifying him of the amount of insurance desired, they were to be deemed insured for that amount, from the time the letter was so posted.

On the night of December 2d, 1882, Cochran having received no application from appellants and anticipating that such might be made by letter as agreed upon, provided for it by designating by a memorandum in his office insurance for them to the

amount of \$5000 each in the Insurance Company of North America, and in the Hamburg Bremen Company—the appellee in this appeal.

About nine o'clock on that night appellee deposited in the post-office a letter addressed to Cochran notifying him to increase the insurance on their cotton in the International Press to the amount of \$10,000. This letter was not delivered until December 4th.

It is claimed by appellee that it was not stamped when posted, and there was strong evidence adduced on the trial to support this conclusion.

Admitting, for the sake of argument, that no stamp had been placed upon the letter, the question arises was this such a compliance with the terms of the agreement between Cochran and appellants as to complete either a contract *of* insurance or a contract for insurance in this particular instance. A contract may be consummated by letters deposited in the post-office; and when an offer is made contemplating an acceptance in this manner, and a letter accepting it is properly mailed, the agreement is complete. (Adams v. Lindsell, 1 B. & Ald. 681; Dunlop v. Higgins, 1 H. L. C. 381; Tayloe v. Insurance Co., 9 Howard, 390.) We know of no decision exactly in point upon the question of posting an unstamped letter; it is held, however, in Maclay v. Harvey, 90 Illinois, 525, that an offer to be accepted by return mail is not assented to by delivering a letter to a messenger to be mailed, who fails to do this in the proper time. The cases are numerous, both in the English and American courts, which hold that if the offer contemplates an acceptance through the post-office, the contract is complete as soon as the letter is mailed accepting it. But in all these cases the letters were duly posted. That this is what is intended by such an offer, we think quite obvious, at least in the United States.

Our postal laws require a prepayment of postage before a letter can either be transmitted or delivered. (Rev. Stat. U. S. arts. 3896, 3900, 3904.) Without this, a communication addressed to another post-office will not be forwarded, and a dropped letter will not be delivered. How is it, then, in the case before us? If the letter was not prepaid, was the posting a compliance with the condition upon which the insurance was to depend according to the original agreement between Cochran and appellants? That it was not the act contemplated by them in making that agreement we think evident from the circumstances of the cases and the ends to be accomplished by the letter.

As a prudent business man, Cochran must have had two objects in view in agreeing to this method of effecting the insurance. One was to secure a delivery to himself of written evidence of appellant's application for insurance ; the other to get prompt notice of the transaction, so that he might protect himself from liability by reporting the insurance to Cotton & Brother, and thereby keeping it in force.

We are cited by appellant's counsel to the Post-Office Regulations, § 439, we presume for the purpose of showing that a person to whom an unstamped "dropped" letter is addressed may secure its delivery. Waiving the question whether we can take judicial notice or not of the regulations of the departments of the general government, we think it a sufficient answer to this to say that even under these rules great delay in the delivery of a letter is the probable result of the omission to prepay the postage. In this case we are not left to speculate upon this matter. The testimony shows that there was a delay of twenty-four hours at least before the letter was delivered, and that this was caused by the fact that no stamp had been placed upon it.

Now, let us suppose that the fire had occurred before the delivery of the letter and after a lapse of twenty-four hours from the time Cochran made the memorandum in his office, and that in the mean time he had received no notice that the letter had been mailed or of its contents. In such a case could appellee be held responsible, when, by the terms of the contract made by its agents, the insurance was to expire if not reported in twenty-four hours? On the other hand, could Cochran be held liable for not reporting the insurance, when, by reason of appellant's neglect, he had failed to get notice of their application? We do not ask these questions for the purpose of answering them. That is unnecessary to the decision of this case. We propound them merely to show that it was a matter of the greatest importance to Cochran that the letter of appellants notifying him of their desire or application should have been properly mailed and *its* delivery without delay and without additional expense to him thereby insured.

It follows from what we have said that in our opinion if the letter of appellants was not stamped when it was deposited in the post-office, the terms of the agreement in regard to notice by a mailed letter were not complied with. If this be the case, then the "surplus" of insurance, which Cochran's memorandum was designed to cover, had not been applied for ; and the contingency had not arisen which could alone authorize him to bind appellee by a designation in his office. Cotton & Brother's agreement was to "cover surplus lines of insurance" for him—

not to insure cotton in advance before he had an application for the insurance. By keeping in view these conclusions the assignments of error are not difficult of determination.¹

Because we find no error in the judgment, it is affirmed.

Affirmed.

Opinion delivered December 17th, 1886.

ANDREW HAAS *v.* ALFRED MYERS *ET AL.*

IN THE SUPREME COURT OF ILLINOIS, NOVEMBER 17, 1884.

[*Reported in 111 Illinois Reports 421.*]

APPEAL from the Appellate Court for the First District ; heard in that Court on appeal from the Superior Court of Cook County ; the Hon. George Gardner, J., presiding.

This was a bill in equity, filed by Andrew Haas, to have himself declared a partner with Alfred Myers in respect to a certain lot of cattle, and for an accounting.

The material facts appearing are, that during 1882, Haas's business was buying cattle, and shipping them to sell in the Chicago market ; that during the same time, Alfred and Benjamin Myers, and William H. and James E. Martin, were engaged in the same business, Alfred and Benjamin Myers as partners under the firm name of A. Myers & Bro., and the Martins as partners under the name of Martin & Bro., and during that time the Myers and Martins were jointly engaged in the same business. Prior to September 20th, 1882, Haas and Alfred Myers had, respectively, been negotiating for the purchase of a lot of cattle in Montana, known as the "Murphy herd," and on that day, Alfred Myers being about to visit the range where the cattle were kept, the two agreed that Myers would ascertain at what price the cattle could be purchased, and buy them if he saw fit ; that in case he bought, he should telegraph Haas at Chicago, indicating the price per head ; that thereupon Haas was to reply by telegraph, at once and without delay, saying "Yes," or "No ;" that if he replied "yes," Myers, on receipt of the telegram, was to telegraph back to Haas the estimated amount required to pay for one-third interest in the cattle, which amount Haas was at once to place to the credit of A. Myers & Bro., at the First National Bank of Chicago, in order that Myers & Bro. could immediately draw for the same to pay toward the cattle, and Haas was to cause

¹ The discussion of the assignments of error has been omitted.—ED.

the bank to telegraph such credit to A. Myers & Bro. at Billings, Mont., which being done, Haas was to have one-third interest in the cattle. Myers proceeded to the range, and on September 26th made a trade with Joseph Murphy for the cattle, at \$45 per head all around, the cattle to be taken at the ranch, Myers paying \$5000 cash down as earnest money to bind the bargain, and agreeing to pay \$15,000 more before the cattle were moved, and the balance of the purchase price at the time of the final shipment of the cattle at Billings, Mont., the purchase price being about \$55,000, and agreeing also that the cattle should be moved within thirty days. The trade was to be concluded at Billings. Murphy and Myers proceeded to Billings, arriving there on September 28th, and on the same day Myers telegraphed to Haas at Chicago, as follows :

“ Do you want Murphy’s forty-five, at ranch ? Answer.

“ A. MYERS.”

At once on receiving this, and on September 29th, Haas telegraphed back :

“ Yes, I will take third interest. Will leave for Billings tonight.”

This despatch never reached Myers or Billings. Later, and within an hour, Haas sent a further despatch :

“ If Murphy cattle are good, there is no danger in buying them. Davis-Hauser cattle sold close to five cents through.

“ A. HAAS.”

This despatch was received by Myers on October 2d. No other despatch or information than this last one being received from Haas by Myers, though Myers inquired frequently at the telegraph office for any reply from Haas, and in the mean time William H. Martin, one of the partners, having joined Myers and Murphy at Billings, on October 2d the contract with Murphy was concluded, and Myers and Martin themselves raised and paid the whole \$15,000, Murphy having refused to wait any longer, and declared that if it were not paid on that day he would refund the \$5000 already paid, and “ call the trade off.” The next day (October 3d) Haas appeared at Billings and claimed a third interest in the contract, insisting that he had sent to Myers the first above-mentioned despatch. Myers informed Haas that he had never received any such telegram, but had received the one last named, about there being “ no danger in buying” the cattle, etc., and that only, and that he and Martin had raised and paid the necessary funds the day

before, and that he (Haas) was entitled to no interest in the purchase. Haas and Myers went together to the telegraph offices at Billings, to ascertain whether or not such despatch (the one first named) had been received there. It was ascertained that no such despatch had been received there, and Myers reiterated his refusal to permit Haas to have any interest in the cattle, notwithstanding Haas stated that he was ready to pay his share, and to do what might be required of him. Myers and his associates shipped the cattle to Chicago, and made a net profit thereon of \$19,100. That amount remained in the hands of Adams & Burke, commission merchants at Chicago.

This bill was filed October 31st, 1882, praying that Haas might be declared to be a partner to the extent of one-third interest in the purchase of the cattle; that an accounting might be had between the partners, and a decree granted the complainant for the one-third share of the net profits, and an injunction restraining the payment over of the money by Adams & Burke. A temporary injunction was granted, and afterward, on the final hearing, the injunction was dissolved and the bill dismissed. On appeal to the Appellate Court for the First District the decree was affirmed, and a further appeal taken to this Court.

Dupee, Judah & Willard for the appellant.

Judd & Whitehouse and *William Ritchie* for the appellees.

SHELDON, J., delivered the opinion of the Court:

It is insisted upon on the part of the appellant, that the partnership here claimed was actually formed; that if there was not a literal there was a substantial performance by Haas of the conditions of the contract; that he did all that he could—telegraphed, as he had agreed, his acceptance—and could do no more until action by Myers; that not putting up his share of the money in the manner provided, was because of the failure of Myers to advise him by telegram of the amount necessary; that the telegraphic acceptance sent by Haas, although not received, had all the legal effect it could have had if it had been received by Myers. In support of this last proposition the rule governing the negotiation of contracts by correspondence through the mail is appealed to, and it is contended the same rule applies in the negotiation of a contract by telegraph—that rule being, that where parties undertake to contract by letter, and one party makes a proposal by letter, and the other by letter accepts and posts his acceptance, the minds of the parties have met, and from the instant of mailing the acceptance the contract is a valid and binding one. See *Household Fire Ins. Co. v. Grant*, L. R. 4 Exch. Div. 216; *Taylor v. Merchants'*

Fire Ins. Co., 9 How. 390; *Mactier v. Frith*, 6 Wend. 103; *Hallock v. Insurance Co.*, 2 Dutch. 268; *Minnesota Oil Co. v. Collier Lead Co.*, 4 Dill. 431; *Abbott v. Shepard*, 48 N. H. 14; *Trevor v. Wood*, 36 N. Y. 307; *Pomeroy on Contracts*, 95, and cases there cited. Although there be contrary authority that a contract made by mutual letters is not complete until the letter accepting the offer has been received by the person making the offer (see *Lewis v. Browning*, 130 Mass. 175), we regard the weight of authority to be in favor of the rule as first above stated. A distinction has been taken, that though in general such a contract takes effect from the time of acceptance, and not from the subsequent notification of it, yet the offerer may not be bound by the fact that the letter of acceptance had been put in the post-office, if the letter never reached its destination. The preponderance of authority does not appear to sustain this distinction, but to hold that the mailing of the letter of acceptance completes the contract, whether the letter reaches its destination or not. In the above cases, in 4 Dill. and 36 N. Y., it was held that the same rule applied in the case of correspondence by telegraph as in the case of correspondence through the mail. Whether the rule does so fully apply in the former case we do not find it necessary now to determine, as, conceding that it does, we do not consider that the rule has application to the facts of the present case. We think that under the arrangement entered into between the parties, the formation of the contract was made dependent upon the actual communication by telegraph, to Myers, of Haas's acceptance. This is not the case of an offer made, and where the simple acceptance completes the contract between the parties. Haas's reply, if it had reached Myers, was not the conclusion of the bargain. Considerable remained to be done afterward, on both sides. Myers, after receipt of the despatch, was to telegraph again, giving the amount to be deposited. Haas was to deposit this amount. The bank was then to telegraph the credit to Myers, so as to make it available for the purchase of the cattle.

We think, too, the terms of the contract imply that Haas's answer that he would take a third interest, should actually reach Myers, and within a very short time, or the contract would not be binding. A large purchase was involved, requiring the payment of a considerable amount of money. Promptness was necessary, and it was important that Haas should furnish his share of the purchase-money necessary to complete the purchase. It was uncertain whether the cattle would be purchased by Myers, and if so, whether Haas would want a third interest in them at the price they could be purchased for. It

was therefore arranged that if Myers purchased, he should telegraph Haas the price per head, and if Haas wanted a third interest at the price, he should, immediately after receiving Myers's despatch, answer back, by telegraph, "Yes" or "No." If the answer was "yes," then Myers would immediately inform Haas, by telegraph, of the amount of money that would be required to be placed to the credit of A. Myers & Bro. at the First National Bank in Chicago, in order to secure a third interest in the purchase of the cattle. Now, Haas never did advise Myers, by telegraph, that he would take an interest. No such telegram ever came to Billings, the place of destination. Manifestly, delivering the message containing an affirmative reply to the telegraph office for transmission, did not answer the purpose. Myers could not act upon that mere delivery. He must have knowledge. Haas was to telegraph, and if the answer was "yes," Myers was to telegraph back the amount of money required; but he could not telegraph back what was the amount of money needed until he was informed of Haas's desire to take a third interest, until he had received the telegram "yes." This shows that it was in the contemplation of the parties that this telegram should not merely have been deposited for transmission, but that it should have been transmitted and been received before there could arise between the parties any completed contract. It was essential that notification of Haas's desire to have a part in the purchase should have come to Myers, to enable him to inform Haas of the amount of money needed from him, and so enable Haas to perform on his part by furnishing his share of the purchase-money.

But further, within an hour after depositing in the telegraph office, for transmission, his telegram of acceptance—"yes"—Haas sends this misleading despatch: "If Murphy cattle are good, there is no danger in buying them," and this telegram was received by Myers October 2d, and was the only one received by him, or that ever came to Billings in answer to his inquiry if Haas wanted an interest in the purchase. What was Myers to understand from this? If Haas wanted an interest in the cattle, the telegram agreed upon between him and Myers by which he should signify that wish, was the word "yes." This was not such a telegram, and it did not express any idea that Haas wanted or would take an interest in the cattle. It stated merely that upon a certain hypothesis—if the Murphy cattle are good—there is no danger in buying them. We think that Myers was justified in taking this despatch sent by Haas, as an abandonment of all interest in the contract, or at least as denoting a want of consent on Haas's part to take an interest

in the cattle, and a want of intention of completing the proposed contract in furnishing a part of the purchase-money, and that Myers could not place further reliance thereon, but might well proceed in the completion of the purchase from Murphy, by raising himself, and with the assistance of Martin, the whole amount of the \$15,000 required to be paid on that day to Murphy, and claim the purchase as being his own, to the exclusion of Haas from any share in it. This second telegraphic despatch did not come within any arrangement made between Haas and Myers, but was Haas's own independent, voluntary act, and he alone is to blame for its misleading effect. The \$15,000 which was to have been paid on moving the cattle from the ranch, Murphy was insisting must be paid on October 2d, or that he would refund the \$5000 paid, and declare the trade "off," that he would not wait any longer. Myers and Martin, after receipt of that despatch, raised the money on that day, and paid it. To be sure, Haas appeared in person at Billings the next day, and offered to perform. This, we think, was too late. It would not be a substantial performance. It was essential that he should have performed before ; that he should have contributed his share to the payment of the purchase-money that was paid to Murphy ; that he could not, after leading Myers to think that he did not want an interest in the purchase, and the latter and Martin raising and paying all the purchase-money required, come in afterward, though only the next day, and then offer to pay his share of the money, and demand the right of participation in the purchase. To have then admitted Haas into the purchase would have been but a matter of favor with Myers—not of obligation.

We think the decree dissolving the injunction and dismissing the bill was right, and the judgment of the Appellate Court will be affirmed.

Judgment affirmed. _____

HELEN C. LEWIS v. MATTHEW P. BROWNING.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS,
JANUARY 6, 1881.

[*Reported in 130 Massachusetts Reports 173.*]

CONTRACT for breach of the covenants of a written lease of a tenement in Boston. Trial in the Superior Court, without a jury, before Rockwell, J., who allowed a bill of exceptions in substance as follows :

The defendant admitted that there had been a breach of the

conditions of the lease, and agreed that judgment might be entered for the plaintiff in the sum of \$2168.22, unless the facts herein stated constituted a defence to this action.

The judge found that the defendant, who was a resident of New York in the year 1868, was, during the summer of that year, temporarily residing and practising his profession as a physician at Cape May, in the State of New Jersey, and that the plaintiff and her husband, Dr. Dio Lewis, residents of Boston at that time, were temporarily residing at Oakland, in the State of California; that on June 10th, 1878, Lewis, who was and still is the authorized agent of his wife, the plaintiff, wrote the defendant a letter, which was received by him, in which he requested the defendant to make him an offer for a new lease of said premises. The defendant replied, making such offer, by letter dated June 22d, 1878. In this letter the defendant gave, as a reason for desiring to make the new contract, his anxiety to be released from all claim by the plaintiff.

On July 8th, 1878, Lewis wrote the defendant a letter, which he received on July 17th, 1878, at Cape May, in which Lewis accepted the defendant's offer, with slight modifications, and which contained the following: "If you agree to this plan, and will telegraph me on receipt of this, I will forward power of attorney to Mr. Ware. Telegraph me 'yes' or 'no.' If 'no' I will go on at once to Boston with my wife, and between us we will try to recover our lost ground. If I do not hear from you by the 18th or 20th, I shall conclude 'no.'"

The defendant, on said July 17th, went to the telegraph office of the Western Union Telegraph Company in Cape May, wrote a telegraphic despatch directed to Dio Lewis, Oakland, Cal., delivered it to the telegraphic agent and operator of said company, and paid the full price for its transmission to Oakland, and gave directions to have it forwarded at once. The defendant did not keep a copy of the telegram. He gave notice to the plaintiff to produce the telegram, and testified that he had exhausted all the means in his power in Boston, New York, and New Jersey, in his endeavors to produce the telegram; that he had been to the Cape May office of the company, and had learned that the operator to whom he gave his despatch was not in charge of that office; that he had made diligent search for him without being able to learn his whereabouts; and that in this search he had had the aid of the superintendent and other officers of the company in Boston. He also offered to prove, by an officer of the company in Boston, that both by rule and custom of the company, so far as he knew the custom, the despatches received and sent from all the offices of the com-

pany were destroyed after they had been in the possession of the company six months. If, under these circumstances, it was competent to prove the contents of said despatch by oral testimony, the judge found that the word telegraphed was "yes."

The judge also found that Lewis never received said telegram; that the new lease to be made, as stipulated in the letters of Lewis and the defendant, was to be like the former lease in form, with the various modifications and changes contained in said letters, and was to be delivered in Boston, and the consideration then paid; and that the Mr. Ware mentioned in Lewis's letter was the plaintiff's attorney, residing in Boston.

The defendant contended that a contract was completed by said letters and telegram on July 17th, under the law of the State of New Jersey; and that this case was controlled by the law of New Jersey. The judge found that the law of New Jersey is as stated in *Hallock v. Commercial Ins. Co.*, 2 Dutcher, 268; ruled, as matter of law, that the facts as above set forth did not show a new contract, and constituted no defence to this action; and found for the plaintiff in the sum agreed upon. The defendant alleged exceptions.

O. T. Gray for the defendant.

D. E. Ware, for the plaintiff, was not called upon.

GRAY, C.J. In *M'Culloch v. Eagle Ins. Co.*, 1 Pick. 278, this Court held that a contract made by mutual letters was not complete until the letter accepting the offer had been received by the person making the offer; and the correctness of that decision is maintained, upon an able and elaborate discussion of reasons and authorities, in *Langdell on Contracts* (2d ed.) 989-996. In England, New York, and New Jersey, and in the Supreme Court of the United States, the opposite view has prevailed, and the contract has been deemed to be completed as soon as the letter of acceptance has been put into the post-office duly addressed. *Adams v. Lindsell*, 1 B. & Ald. 681; *Dunlop v. Higgins*, 1 H. L. Cas. 381, 398-400; *Newcomb v. De Roos*, 2 E. & E. 271; *Harris's Case*, L. R. 7 Ch. 587; *Lord Blackburn in Brogden v. Metropolitan Railway*, 2 App. Cas. 666, 691, 692; *Household Ins. Co. v. Grant*, 4 Ex. D. 216; *Lindley, J., in Byrne v. Van Tienhoven*, 5 C. P. D. 344, 348; 2 Kent Com. 477, note c; *Mactier v. Frith*, 6 Wend. 103; *Vassar v. Camp*, 1 Kernan, 441; *Trevor v. Wood*, 36 N. Y. 307; *Hallock v. Commercial Ins. Co.* 2 Dutcher, 268, and 3 Dutcher, 645; *Tayloe v. Merchants' Ins. Co.*, 9 How. 390.

But this case does not require a consideration of the general question; for, in any view, the person making the offer may always, if he chooses, make the formation of the contract which

he proposes dependent upon the actual communication to himself of the acceptance. Thesiger, L.J., in *Household Ins. Co. v. Grant*, 4 Ex. D. 223. Pollock on Con. (2d ed.) 17. Leake on Con. 39, note. And in the case at bar, the letter written in the plaintiff's behalf by her husband as her agent on July 8th, 1878, in California, and addressed to the defendant at Boston, appears to us clearly to manifest such an intention. After proposing the terms of an agreement for a new lease, he says: "If you agree to this plan, and will telegraph me on receipt of this, I will forward power of attorney to Mr. Ware," the plaintiff's attorney in Boston. "Telegraph me 'yes' or 'no.' If 'no,' I will go on at once to Boston with my wife, and between us we will try to recover our lost ground. If I do not hear from you by the 18th or 20th, I shall conclude 'no.' " Taking the whole letter together, the offer is made dependent upon an actual communication to the plaintiff of the defendant's acceptance on or before July 20th, and does not discharge the old lease, nor bind the plaintiff to execute a new one, unless the acceptance reaches California within that time. Assuming, therefore, that the defendant's delivery of a despatch at the telegraph office had the same effect as the mailing of a letter, he has no ground of exception to the ruling at the trial.¹

Exceptions overruled.

¹ But it is insisted by the defendants' counsel, that this case is taken out of the rule by the concluding clause in the defendant's letter of August 30th, which is in these words—viz.: "We have extended the period of delivery to October 30th, as there will be at least ten days' delay from the date of your letter, before we can receive and act upon your reply. *As soon as received*, we shall send among the farmers and secure the first lots, even at an extra price, and where not threshed out, shall caution them against breaking the barley as little as possible." The idea advanced is, that this clause, taken in connection with that in the defendants' letter of August 22d, in which they say, "It being understood that if this offer be accepted, speedy notice of the same be given us," is equivalent to an express condition, that the defendants would be bound from the time when *they should receive* notice of the plaintiffs' acceptance, and not before.

But this position gives, I think, a force and an interpretation to those clauses which was never intended, and which they will hardly bear. The clause in the letter of August 22d cannot with propriety be supposed to refer to any other than a notice by mail, through which the whole negotiation was no doubt expected to be, and was in fact conducted. When a notice is to be given by mail, in most cases if not in all, it is sufficient for the party giving notice to deposit in the mail. He can do nothing more to insure its safe delivery, and is not responsible for its miscarriage. In regard to the clause in the letter of August 30th, it appears to me plain, that it was not intended and cannot be construed as fixing the time when the contract should become obligatory, but as expressive merely of the promptness with which the defendants *designed to act*, upon receiving notice that

SAMUEL P. WHITE, RESPONDENT, v. JOHN W. CORLIES
AND JONATHAN N. TIFT, APPELLANTS.

IN THE COURT OF APPEALS OF NEW YORK, NOVEMBER 20, 1871.

[*Reported in 46 New York Reports 467.*]

APPEAL from judgment of the General Term of the first judicial district, affirming a judgment entered upon a verdict for plaintiff.

The action was for an alleged breach of contract.

The plaintiff was a builder, with his place of business in Fortieth Street, New York City.

The defendants were merchants at 32 Dey Street.

In September, 1865, the defendants furnished the plaintiff with specifications, for fitting up a suit of offices at 57 Broadway, and requested him to make an estimate of the cost of doing the work.

On September 28th the plaintiff left his estimate with the defendants, and they were to consider upon it, and inform the plaintiff of their conclusions.

On the same day the defendants made a change in their specifications, and sent a copy of the same, so changed, to the plaintiff for his assent under his estimate, which he assented to by signing the same and returning it to the defendants.

On the day following the defendants' book-keeper wrote the plaintiff the following note :

“ NEW YORK, September 29.

“ *Upon an agreement* to finish the fitting up of offices 57 Broadway in two weeks from date, you can begin at once.

“ The writer will call again, probably between 5 and 6 this P.M.

“ W. H. R.,

“ For J. W. Corlies & Co., 32 Dey Street.”

No reply to this note was ever made by the plaintiff ; and on the next day the same was countermanded by a second note from the defendants.

Immediately on receipt of the note of September 29th, and before the countermand was forwarded, the plaintiff commenced a performance by the purchase of lumber and beginning work thereon.

their offer was accepted. Something less equivocal than this should be required to change a fixed and settled rule of law.—Selden, J., *Vassar v. Camp*, 11 N. Y. 441, 447-448.—ED.

And after receiving the countermand, the plaintiff brought this action for damages for a breach of contract.

The court charged the jury as follows : " From the contents of this note which the plaintiff received, was it his duty to go down to Dey Street (meaning to give notice of assent), before commencing the work ?

" In my opinion it was not. He had a right to act upon this note and commence the job, *and that was a binding contract between the parties.*"

To this defendants excepted.

L. Henry for appellants.

Field for respondent.

FOLGER, J. We do not think that the jury found, or that the testimony shows, that there was any agreement between the parties, before the written communication of the defendants of September 30th was received by the plaintiff. This note did not make an agreement. It was a proposition, and must have been accepted by the plaintiff before either party was bound, in contract, to the other. The only overt action which is claimed by the plaintiff as indicating on his part an acceptance of the offer, was the purchase of the stuff necessary for the work, and commencing work, as we understand the testimony, upon that stuff.

We understand the rule to be, that where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act. It does not need that the acceptance shall come to the knowledge of the one making the offer before he shall be bound. But though the manifestation need not be brought to his knowledge before he becomes bound, he is not bound, if that manifestation is not put in a proper way to be in the usual course of events, in some reasonable time communicated to him. Thus a letter received by mail containing a proposal may be answered by letter by mail, containing the acceptance. And in general, as soon as the answering letter is mailed, the contract is concluded. Though one party does not know of the acceptance, the manifestation thereof is put in the proper way of reaching him.

In the case in hand, the plaintiff determined to accept. But a mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act, which, in itself, is no indication of an acceptance, become such, because accompanied by an unevinced mental determination. Where the act uninterpreted by concurrent evidence of the mental pur-

pose accompanying it, is as well referable to one state of facts as another, it is no indication to the other party of an acceptance, and does not operate to hold him to his offer.

Conceding that the testimony shows, that the plaintiff did resolve to accept this offer, he did no act which indicated an acceptance of it to the defendants. He, a carpenter and builder, purchased stuff for the work. But it was stuff as fit for any other like work. He began work upon the stuff, but as he would have done for any other like work. There was nothing in his thought formed but not uttered, or in his acts that indicated or set in motion an indication to the defendants of his acceptance of their offer, or which could necessarily result therein.

But the charge of the learned judge was fairly to be understood by the jury as laying down the rule to them, that the plaintiff need not indicate to the defendants his acceptance of their offer; and that the purchase of stuff and working on it after receiving the note, made a binding contract between the parties. In this we think the learned judge fell into error.

The judgment appealed from must be reversed, and a new trial ordered, with costs to abide the event of the action.

All concur, but ALLEN, J., not voting.

Judgment reversed, and new trial ordered.

BOIT & MCKENZIE v. MAYBIN.

IN THE SUPREME COURT OF ALABAMA, JANUARY TERM, 1875.

[*Reported in 52 Alabama Reports 252.*]

APPEAL from Circuit Court of Henry.

Tried before Hon. J. McCaleb Wiley.

The opinion states the case.

J. A. Cleudennin for appellant.

W. C. Oates, contra.

JUDGE, J. The plaintiffs in the court below were dealers in the article of "sea-fowl guano," and their place of business was in the city of Savannah, in the State of Georgia. The defendant proposed to their agent in Alabama to purchase two tons of the guano, and by the verbal request of the defendant the agent transmitted to the plaintiffs an order for the same, with instructions to ship it to the defendant at Eufaula, Ala., by railroad. The guano was shipped, pursuant to the order, and in due time was received by the defendant, who used it as a fertilizer.

Subsequently, the agent of the plaintiffs took the obligation in writing of defendant to the plaintiffs, for the payment to them of the purchase-money, which obligation was executed in Alabama, and is the foundation of the present suit.

One defence to the action interposed by the defendant in the Court below was, that the guano had not been inspected and branded before it was sold, by an inspector of fertilizers in the State of Alabama, pursuant to the provisions of the act of the legislature, approved March 1st, 1871; and that therefore the sale was void, and that no action could be maintained for the recovery of the purchase-money, inasmuch as the act made it a penal offence, punishable by indictment, to sell any fertilizer within this State, which had not been inspected and stamped as required by the acts.

This act of the legislature, under the facts in evidence, had no application to this case; for, in legal contemplation, the contract was made in the State of Georgia. When a proposal to purchase goods is made by letter sent to another State, and is there assented to, the contract of sale is made in that State. *McIntyre v. Parks*, 3 Met. (Mass.) 207; 1 Par. on Con. 525.

The delivery of the guano on board of the cars at Savannah for shipment to the defendant, pursuant to his order, was a consummation of the contract of sale, and vested the title, on such delivery, in the purchaser, subject to the vendor's right, in a proper case, of *stoppage in transitu*.

The Court erred therefore in refusing the charge asked, which asserted this proposition.¹

For the errors we have pointed out, the judgment must be reversed and the cause remanded.

FIRST NATIONAL BANK v. EUGENE C. WATKINS.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS,
SEPTEMBER 15, 1891.

[*Reported in 154 Massachusetts Reports 385.*]

CONTRACT, upon a promissory note for \$500, dated October 29th, 1887, and made payable on March 1st, 1888, and signed by the defendant. Writ dated December 11th, 1890. The answer set up, among other things, that the defendant gave the note for money borrowed by him of the plaintiff bank, and executed and delivered a mortgage of personal property as col-

¹ Only so much of the opinion is given as relates to this charge.—ED.

lateral security therefor ; that before the note became due the defendant sold his interest in said property to a third person subject to the mortgage, having theretofore informed the plaintiff that he was about to sell the same ; that the plaintiff assented to the sale, and agreed to collect the note by a foreclosure of the mortgage and a sale of the mortgaged property if the purchaser thereof did not pay the same at maturity ; that the defendant was induced to sell such mortgaged property by this undertaking and agreement of the plaintiff ; that the plaintiff neglected to foreclose the mortgage deed at maturity, at which time the property was sufficient in value to pay the note, but extended the note, and the property depreciated in value, and the security was lost ; and that the plaintiff, having by its own negligence and contrary to its express agreement lost such security and prevented the defendant from realizing enough from the same to pay the note, ought not to be allowed to recover anything of the defendant in the action.

At the trial in the Superior Court, before Braley, J., the defendant offered to prove that the note was made to one Benedict by the defendant, and a mortgage of personal property given to secure the note ; that Benedict indorsed the note to the plaintiff bank, and made over his interest in the mortgage to it, and thereupon both became the property of the plaintiff ; that the defendant afterward sold his equity in the mortgaged property to a third person, and the plaintiff bank then agreed with the defendant that it would look to the mortgaged property alone for payment of the note ; that the plaintiff afterward extended the time for the payment of the note, without the knowledge or request of the defendant ; that on April 4th, 1890, the sum of \$178.15, the amount realized from the foreclosure and sale of the mortgaged property, was paid and indorsed upon the note ; and that at the time of the maturity of the note the mortgaged property was of more than sufficient value to pay the same.

The judge ruled that, if the defendant proved what was stated in his offer of proof, it would not amount to a defence to the action, and ordered a verdict for the plaintiff, and reported the case for the determination of this Court. If the ruling was right, the verdict was to stand ; otherwise, the verdict was to be set aside, and a new trial ordered.

E. M. Wood for the defendant.

M. Wilcox for the plaintiff.

KNOWLTON, J. The exceptions were waived at the argument, and we have to consider only the questions presented by the report. The ruling of the Superior Court was made on the

defendant's offer of proof in the opening of his counsel to the jury, and the argument in behalf of the plaintiff assumes that the agreement referred to in the offer was upon a sufficient consideration, and was enforceable as an independent contract. The contention chiefly relied on by the plaintiff is, that such an agreement is not available in defence to a suit on the note, although if broken it would furnish a good foundation for an action for damages. We do not assent to this proposition. An agreement to "look to the mortgaged property alone for the payment of the note" would be, in effect, an agreement to discharge the defendant from all liability upon it, which, if made upon a valuable consideration, would be a good defence to a suit for payment of it; although a new and independent contract, it would be unreasonable to permit a plaintiff who had made such an agreement to collect his note of the maker, and to compel the maker to seek his remedy by a suit to recover back from the payee as damages the sum which was paid. The tendency of the modern cases is to allow such an agreement to be shown in defence, to avoid circuitry of action. *Howard v. Ames*, 3 Met. 308, 311; *Hood v. Adams*, 124 Mass. 481, 485; *Wadsworth v. Glynn*, 131 Mass. 220; *Hodgkins v. Moulton*, 100 Mass. 309, was decided on a question of pleading, and in *Waterhouse v. Kendall*, 11 Cush. 128, and *Traver v. Stevens*, 11 Cush. 167, the question related to the consideration of the note, and differed materially from that in the case at bar.

The offer, as stated in the report, does not very clearly show whether the agreement referred to was founded on a sufficient consideration; but the allegations of the answer are full in this particular, and the defendant's counsel asserted in argument, and the plaintiff's counsel did not deny, that the offer was in fact to show an agreement which would constitute a contract. If there was an agreement purporting to be made in reference to the defendant's sale of the equity of redemption in the mortgaged property in the form of an offer that the defendant might, if he chose, refrain from paying the note, and from taking measures to secure payment of it out of the proceeds of the mortgaged property, and that the plaintiff would look to the property alone for the payment of it, and the defendant, relying upon the offer, did refrain from making any effort to have the property applied to the payment of the note when it became due, and thereby suffered detriment, there would be a sufficient consideration for the agreement. It would be an ordinary case of unilateral contract, growing out of an offer of one party to do something if the other will do or refrain from doing something else. If the party to whom such an offer is made acts

upon it in the manner contemplated, either to the advantage of the offerer or to his own disadvantage, such action makes the contract complete, and notice of the acceptance of the offer before the action is unnecessary. *Lent v. Padelford*, 10 Mass. 230; *Train v. Gold*, 5 Pick. 380; *Brogden v. Metropolitan Railway*, 2 App. Cas. 666, 691. *Weaver v. Wood*, 9 Penn. St. 220. *Patton v. Hassinger*, 69 Penn. St. 311.

In view of all the circumstances, we think the report should be interpreted as presenting the question whether the agreement offered to be proved, if made for a good consideration, would be a bar to the present suit. The entry should be,
Verdict set aside.

DAVIS SEWING MACHINE COMPANY v. RICHARDS
AND ANOTHER.

IN THE SUPREME COURT OF THE UNITED STATES, DECEMBER 7,
1885.

[*Reported in 115 United States Reports 524.*]

THIS was an action brought in the Supreme Court of the District of Columbia, upon a guaranty of the performance by one John W. Poler of a contract under seal, dated December 17th, 1872, between him and the plaintiff corporation, by which it was agreed that all sales of sewing machines which the corporation should make to him should be upon certain terms and conditions, the principal of which were that Poler should use all reasonable efforts to introduce, supply, and sell the machines of the corporation, at not less than its regular retail prices, throughout the District of Columbia and the counties of Prince George and Montgomery in the State of Maryland, and should pay all indebtedness by account, note, indorsement or otherwise, which should arise from him to the corporation under the contract, and should not engage in the sale of sewing machines of any other manufacture; and that the corporation, during the continuance of the agency, should sell its machines to him at a certain discount, and receive payment therefor in certain manner; and that either party might terminate the agency at pleasure.

The guaranty was upon the same paper with the above contract, and was as follows:

"For value received, we hereby guarantee to the Davis Sewing Machine Company of Watertown, N. Y., the full performance of the foregoing contract on the part of John W. Poler,

and the payment by said John W. Poler of all indebtedness, by account, note, indorsement of notes (including renewals and extensions) or otherwise, to the said Davis Sewing Machine Company, for property sold to said John W. Poler, under this contract, to the amount of three thousand (\$3000) dollars. Dated Washington, D. C., December 17th, 1872.

"A. ROTHWELL.

"A. C. RICHARDS."

Under the guaranty were these words: "I consider the above sureties entirely responsible. Washington, December 19th, 1872.

"J. T. STEVENS."

At the trial the above papers, signed by the parties, were given in evidence by the plaintiff, and there was proof of the following facts: On December 17th, 1872, at Washington, the contract was executed by Poler, and the guaranty was signed by the defendants, and the contract and guaranty, after being so signed, were delivered by the defendants to Poler, and by Poler to Stevens, the plaintiff's attorney, and by Stevens afterward forwarded, with his recommendation of the sureties, to the plaintiff at Watertown, in the State of New York, and the contract there executed by the plaintiff. The plaintiff afterward delivered goods to Poler under the contract, and he did not pay for them. The defendants had no notice of the plaintiff's execution of the contract or acceptance of the guaranty, and no notice or knowledge that the plaintiff had furnished any goods to Poler under the contract or upon the faith of the guaranty, until January, 1875, when payment therefor was demanded by the plaintiff of the defendants, and refused. At the time of the signing of the guaranty, the plaintiff had furnished no goods to Poler, and the negotiations then pending between the plaintiff and Poler related to prospective transactions between them.

The Court instructed the jury as follows: "It appearing that, at the time the defendants signed the guaranty on the back of the contract between the plaintiff and Poler, the plaintiff had not executed the contract or assented thereto, and that the contract and guaranty related to prospective dealings between the plaintiff and Poler, and that subsequently to the signing thereof by the defendants the attorney for the plaintiff approved the responsibility of the guarantors and sent the contract to Watertown, N. Y., to the plaintiff, which subsequently signed it, and no notice having been given by the plaintiff to the defendants of the acceptance of such contract and guaranty, and that it intended to furnish goods thereon and hold the de-

defendants responsible, the plaintiff cannot recover, and the jury should find for the defendants."

A verdict was returned for the defendants, and judgment rendered thereon, which on exceptions by the plaintiff was affirmed at the general term, and the plaintiff sued out this writ of error, pending which one of the defendants died and his executor was summoned in.

James G. Payne for plaintiff in error.

W. A. Cook and *C. C. Cole* for defendants in error.

GRAY, J., delivered the opinion of the Court. After stating the facts in the language above reported, he continued :

The decision of this case depends upon the application of the rules of law stated in the opinion in the recent case of *Davis v. Wells*, 104 U. S. 159, in which the earlier decisions of this Court upon the subject are reviewed.¹

¹ The opinion in *Davis v. Wells* was given by Mr. Justice Matthews, and was as follows :

The answer set up, by way of defence, that there was no notice to the defendants from the plaintiffs of their acceptance of the guaranty, and their intention to act under it ; and no notice after the account was closed, of the amount due thereon ; and no notice of the demand of payment upon Gordon & Co., and of their failure to pay within a reasonable time thereafter. But there was no allegation that by reason thereof any loss or damage had accrued to the defendants.

On the trial it was in evidence, that this guaranty was executed by the defendants below, and delivered to Gordon on the day of its date, for delivery by him to Wells, Fargo & Co., which took place on the same day ; that Gordon & Co. were then indebted to the plaintiffs below for a balance of over \$9000 on their bank account ; that their account continued to be overdrawn, Wells, Fargo & Co. permitting it on the faith of the guaranty, from that time till July 31st, 1875, when it was closed, with a debit balance of \$6200 ; that the account was stated and payment demanded at that time of Gordon & Co., who failed to make payment ; that a formal notice of the amount due and demand of payment was made by Wells, Fargo & Co., of the defendants below, on May 26th, 1876, the day before the action was brought. There was no evidence of any other notice having been given in reference to it ; either that Wells, Fargo & Co. accepted it and intended to rely upon it, or of the amount of the balance due at or after the account was closed ; and no evidence was offered of any loss or damage to the defendants by reason thereof, or in consequence of the delay in giving the final notice of Gordon & Co.'s default.

The defendants' counsel requested the Court, among others not necessary to refer to, to give to the jury the following instructions, numbered first, second, third, and fifth :

1. If the jury believes from the evidence that the guaranty sued upon was delivered by the defendants to Joseph Gordon, and not to the plaintiff, but was afterward delivered to the latter by Joseph Gordon, or by Gordon & Co., it became and was the duty of Wells, Fargo & Co. thereupon to notify the defendants of the acceptance of said guaranty, and their intention to make advancements on the faith of it ; and, if they neglected or failed so to

Those rules may be summed up as follows : A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract. But if the guaranty is signed by the guarantor without any previous request of the other party, and do, the defendants are not liable on the guaranty, and your verdict must be for the defendants.

2. If Wells, Fargo & Co. made any advancements to Gordon & Co. on overdrafts on the faith of said guaranty, it became and was the duty of plaintiff to notify the defendants, within a reasonable time after the last of said advancements of the amount advanced under the guaranty, and if the plaintiff failed or neglected so to do, it cannot recover under the guaranty, and your verdict must be for the defendants.

3. What is a reasonable time in which notice should be given is a question of law for the Court. Whether notice was given is one of fact for the jury. The Court, therefore, instructs you that if notice of the advancements made under said guaranty was not given until after the lapse of twelve months or upward from the time the last advancement was made to Gordon & Co., this was not in contemplation of law a reasonable notice, and your verdict, if you so find the fact to be, should be for the defendants.

5. Before any right of action accrued in favor of plaintiff under said guaranty, it was incumbent on it to demand payment of the principal debtor, Gordon & Co., and on their refusal to pay, to notify the defendants. If the jury, therefore, find that no such demand was made, and no notice given to the defendants, the plaintiff cannot recover upon the guaranty.

The Court refused to give each of these instructions, and the defendants excepted.

The following instructions were given by the Court to the jury, to the giving of each of which the defendants excepted :

1. You are instructed that the written guaranty offered in evidence in this case is an unconditional guaranty by defendants, of any and all overdrafts, not exceeding in amount \$10,000, for which said Gordon & Co. were indebted to the plaintiff at the date of the commencement of this suit. If the jury believe from the evidence that said guaranty was by said defendants, or by any one authorized by them to deliver the same, actually delivered to plaintiff, and that plaintiff accepted and acted on the same, such delivery, acceptance, and action thereon by plaintiff bind the defendants, and render the defendants responsible in the action for all overdrafts upon plaintiff made by Gordon & Co. at the date of said delivery of said guaranty, and since, and which were unpaid at the date of the commencement of this suit, not exceeding \$10,000.

2. The jury are instructed that the written document under seal, offered in evidence in this case, implies a consideration, and constitutes an unconditional guaranty of whatever overdraft, if any, not exceeding \$10,000, which the jury may find from the evidence that Gordon & Co. actually owed the plaintiff at the date of the bringing of this suit ; and, further, if

in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract.

The case at bar belongs to the latter class. There is no evidence of any request from the plaintiff corporation to the guarantors, or of any consideration moving from it and received or acknowledged by them at the time of their signing the guaranty. The general words at the beginning of the guaranty, "value received," without stating from whom, are quite as you believe from the evidence that an account was stated of such overdraft between plaintiff and J. Gordon & Co., then the plaintiff is entitled to interest on the amount found due at such statement, from the date thereof, at the rate of ten per cent per annum.

These exceptions form the basis of the assignment of errors.

The charge of the Court first assigned for error, and its refusal to charge upon the point as requested by the plaintiffs in error, raise the question whether the guaranty becomes operative if the guarantor be not, within a reasonable time, informed by the guarantee of his acceptance of it and intention to act under it.

It is claimed in argument that this has been settled in the negative by a series of well-considered judgments of this Court.

It becomes necessary to inquire precisely what has been thus settled, and what rule of decision is applicable to the facts of the present case.

In *Adams v. Jones* (12 Pet. 207, 213), Mr. Justice Story, delivering the opinion of the Court, said: "And the question which, under this view, is presented, is whether, upon a letter of guaranty, addressed to a particular person or to persons generally, for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor that the person giving the credit has accepted or acted upon the guaranty and given the credit on the faith of it. We are all of the opinion that it is necessary; and this is not now an open question in this Court, after the decisions which have been made in *Russell v. Clarke*, 7 Cranch, 69; *Edmonston v. Drake*, 5 Peters' Rep. 624; *Douglass v. Reynolds*, 7 Peters' Rep. 113; *Lee v. Dick*, 10 Peters, 482; and again recognized at the present term in the case of *Reynolds v. Douglass*. It is in itself a reasonable rule, enabling the guarantor to know the nature and extent of his liability; to exercise due vigilance in guarding himself against losses which might otherwise be unknown to him; and to avail himself of the appropriate means in law and equity to compel the other parties to discharge him from further responsibility. The reason applies with still greater force to cases of a general letter of guaranty; for it might otherwise be impracticable for the guarantor to know to whom and under what circumstances the guaranty attached; and to what period it might be protracted. Transactions between the other parties to a great extent might from time to time exist, in which credits might be given and payments might be made, the existence and due appropriation of which might materially affect his own rights and security. If, therefore, the questions were entirely new, we should not be disposed to hold a different doctrine; and we think the English decisions are in entire conformity to our own."—ED.

consistent with a consideration received by the guarantors from the principal debtor only. The certificate of the sufficiency of the guarantors, written by the plaintiff's attorney under the guaranty, bears date two days later than the guaranty itself. The plaintiff's original contract with the principal debtor was not executed by the plaintiff until after that. The guarantors had no notice that their sufficiency had been approved, or that their guaranty had been accepted, or even that the original contract had been executed or assented to by the plaintiff, until long afterward, when payment was demanded of them for goods supplied by the plaintiff to the principal debtor.

Judgment affirmed.

CHARLES A. BISHOP v. FRANK H. EATON.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS,
JUNE 19, 1894.

[*Reported in 161 Massachusetts Reports 496.*]

CONTRACT, on a guaranty. Writ dated February 2d, 1892. Trial in the Superior Court without a jury, before Braley, J., who found the following facts.

The plaintiff in 1886 was a resident of Sycamore in the State of Illinois, and was to some extent connected in business with Harry H. Eaton, a brother of the defendant. In December, 1886, the defendant in a letter to the plaintiff said, "If Harry needs more money, let him have it, or assist him to get it, and I will see that it is paid."

On January 7th, 1887, Harry Eaton gave his promissory note for two hundred dollars to one Stark, payable in one year. The plaintiff signed the note as surety, relying on the letter of the defendant, and looked to the defendant solely for reimbursement, if called upon to pay the note. Shortly afterward the plaintiff wrote to the defendant a letter stating that the note had been given and its amount, and deposited the letter in the mail at Sycamore, postage prepaid, and properly addressed to the defendant at his home in Nova Scotia. The letter, according to the testimony of the defendant, was never received by him. At the maturity of the note the time for its payment was extended for a year, but whether with the knowledge or consent of the defendant was in dispute. In August, 1889, in an interview between them, the plaintiff asked the defendant to take up the note still outstanding, and pay it, to which the de-

fendant replied : " Try to get Harry to pay it. If he don't, I will. It shall not cost you anything."

On October 1st, 1891, the plaintiff paid the note, and thereafter made no effort to collect it from Harry Eaton, the maker. The defendant testified that he had no notice of the payment of the note by the plaintiff until December 22d, 1891.

The defendant requested the judge to rule : 1. The letter of the defendant constituted in law no more than an offer of guaranty. 2. The defendant did not become bound by a contract of guaranty unless it appeared from a preponderance of the evidence that, within a reasonable time after his offer was accepted and acted upon, he had notice of such acceptance, and the giving of credit thereon. 3. The mere deposit in the mail of a letter accepting an offer of guaranty which has been made by mail, such letter being properly stamped and addressed to the party making the offer, and mailed within a reasonable time after the acceptance, does not in law constitute such notice to the latter as thereupon to bind him. 4. The defendant did not become bound by a contract of guaranty, if at all, unless he actually received such letter of acceptance. 5. A delay for two years and a half after accepting and acting upon an offer of guaranty to give notice to the person making the offer is an unreasonable delay. 6. If for a year and a half after the maturity of the note and the default of payment by the maker, the defendant had no notice of the default, he was discharged from his contract unless he subsequently waived his rights arising from the plaintiff's laches.

The judge declined so to rule, and ruled, as matter of law upon the findings of fact, that the plaintiff was entitled to recover, and ordered judgment for him ; and the defendant alleged exceptions.

F. G. Cook for the defendant.

R. W. Light for the plaintiff.

KNOWLTON, J. The defendant requested many rulings in regard to the law applicable to contracts of guaranty, most of which it becomes necessary to consider. The language relied on was an offer to guarantee, which the plaintiff might or might not accept. Without acceptance of it there was no contract, because the offer was conditional and there was no consideration for the promise. But this was not a proposition which was to become a contract only upon the giving of a promise for the promise, and it was not necessary that the plaintiff should accept it in words, or promise to do anything before acting upon it. It was an offer which was to become effective as a contract upon the doing of the act referred to. It was an offer

to be bound in consideration of an act to be done, and in such a case the doing of the act constitutes the acceptance of the offer and furnishes the consideration. Ordinarily there is no occasion to notify the offerer of the acceptance of such an offer, for the doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer. But if the act is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that which constitutes the acceptance. In such a case it is implied in the offer that, to complete the contract, notice shall be given with due diligence, so that the promisor may know that a contract has been made. But where the promise is in consideration of an act to be done, it becomes binding upon the doing of the act so far that the promisee cannot be affected by a subsequent withdrawal of it, if within a reasonable time afterward he notifies the promisor. In accordance with these principles, it has been held in cases like the present, where the guarantor would not know of himself, from the nature of the transaction, whether the offer has been accepted or not, that he is not bound without notice of the acceptance, seasonably given after the performance which constitutes the consideration. *Babcock v. Bryant*, 12 Pick. 133 ; *Whiting v. Stacy*, 15 Gray, 270 ; *Schlessinger v. Dickinson*, 5 Allen, 47.

In the present case the plaintiff seasonably mailed a letter to the defendant, informing him of what he had done in compliance with the defendant's request, but the defendant testified that he never received it, and there is no finding that it ever reached him. The judge ruled, as matter of law, that upon the facts found, the plaintiff was entitled to recover, and the question is thus presented whether the defendant was bound by the acceptance when the letter was properly mailed, although he never received it.

When an offer of guaranty of this kind is made, the implication is that notice of the act which constitutes an acceptance of it shall be given in a reasonable way. What kind of a notice is required depends upon the nature of the transaction, the situation of the parties, and the inferences fairly to be drawn from their previous dealings, if any, in regard to the matter. If they are so situated that communication by letter is naturally to be expected, then the deposit of a letter in the mail is all that is necessary. If that is done which is fairly to be contemplated from their relations to the subject-matter and from their course of dealing, the rights of the parties are fixed, and a failure

actually to receive the notice will not affect the obligation of the guarantor.

The plaintiff in the case now before us resided in Illinois, and the defendant in Nova Scotia. The offer was made by letter, and the defendant must have contemplated that information in regard to the plaintiff's acceptance or rejection of it would be by letter. It would be a harsh rule which would subject the plaintiff to the risk of the defendant's failure to receive the letter giving notice of his action on the faith of the offer. We are of opinion that the plaintiff, after assisting Harry to get the money, did all that he was required to do when he seasonably sent the defendant the letter by mail informing him of what had been done.

How far such considerations are applicable to the case of an ordinary contract made by letter, about which some of the early decisions are conflicting, we need not now consider.

Exceptions sustained.

T. G. EVANS & CO., APPELLANTS, v. C. S. McCORMICK.

IN THE SUPREME COURT OF PENNSYLVANIA, APRIL 1, 1895.

[*Reported in 167 Pennsylvania State Reports 247.*]

ARGUED March 19th, 1895. Appeal, No. 74, July Term, 1894, by plaintiffs, from order of C. P. Clinton County, September Term, 1890, No. 167, refusing to take off nonsuit. Before Sterrett, C.J., Green, Williams, McCollum and Fell, JJ. Affirmed.

Assumpsit on an alleged contract of guaranty. Before Savidge, P.J., of the eighth judicial district, specially presiding.

At the trial the Court entered a compulsory nonsuit, which it subsequently refused to take off, Savidge, P.J., filing the following opinion :

"The cause of action was the alleged guaranty of C. S. McCormick, the defendant.

"Plaintiffs were in the wholesale crockery and queensware business at Pittsburg, Pa. Early in July, 1889, they received an order for certain goods from Mrs. S. M. Bierly of Du Bois, Pa. Their travelling salesman had taken the order from Mrs. Bierly at Du Bois. Not satisfied of Mrs. Bierly's solvency, before proceeding to fill the order, they telegraphed defendant at Lock Haven as follows :

“ ‘PITTSBURGH, PA., 2-13-89.

“ ‘C. S. McCORMICK : Bierly's purchases amount to about \$700. Will you guarantee payment ?

“ ‘T. G. EVANS & CO.’

to which defendant three days later wired the following answer :

“ ‘LOCK HAVEN, PA., 2-16-89.

“ ‘T. G. EVANS & CO., 213 Market St., Pgh.

“ ‘I will guarantee payment of Bierly bill.

“ ‘C. S. McCORMICK.’

“ Just what led to this inquiry does not appear. Upon receipt of McCormick's telegram and on the strength of the alleged guaranty plaintiffs shipped the goods ordered, some to Mrs. Bierly and some to McCormick at Du Bois. All were received by Mrs. Bierly. On plaintiffs' book of original entry, some of the goods were charged to Mrs. Bierly and some to McCormick. On their ledger all were charged to McCormick.

“ Because no notice had been given to McCormick of the acceptance of his guaranty, and that the goods had been sold on the strength of the same, plaintiffs were nonsuited.

“ The decisions leave no room for doubt that, except ‘in cases of absolute guaranty, accepted when given’ notice of acceptance is necessary to fix the liability of the guarantor. *Gardner v. Lloyd*, 110 Pa. 278, and cases there cited.

“ It is contended by counsel, however, that ‘if the guaranty is made at the request of the guarantee it then becomes the answer of the guarantor to a proposal made to him, and its delivery to and for the use of the guarantee completes the communication between them and constitutes a contract.’ As authority for this position *Davis v. Wells*, 104 U. S. 159, and *Sewing Machine Co. v. Richards*, 115 U. S. 524, are cited. These cases do so hold although the decisions turned on other points.

“ Looking to our own decisions, we find a different doctrine held in *Kay v. Allen*, 9 Pa. 320 ; it was argued by counsel, ‘that a precedent request by the creditor to the party subsequently offering the guaranty was equivalent to notice of acceptance.’ Mr. Justice Bell delivering the opinion of the Court could find no warrant for any such view. In rejecting the proposition he reasons as follows : ‘Indeed it is difficult to imagine how precedent request alone can supply the place of subsequent notice, since after request made and proffer of guaranty, the merchant may refuse the credit or advance craved,

and without notice the surety cannot know whether he has or has not. So far is this insisted on, that it is said without notice there can be no contract ; for like all other contracts, that of guaranty requires both a proposal and acceptance thereof.' This doctrine was distinctly recognized and reaffirmed in *Gardner v. Lloyd*, *supra*, decided since the case in 104 U. S., Mr. Justice Green quoting the very language of Judge Bell.

"The reasoning of the Supreme Court of this State is convincing while for the doctrine of the United States Court no reason is offered, and we feel bound to follow the decisions of our own courts.

"In the case at bar the most that can be said for plaintiffs is that their telegram was a precedent request which was followed by a subsequent offer of guaranty from the defendant. Defendant was entitled to notice before he could be held on his guaranty. To my mind plaintiffs have not made a better if indeed so good a showing as did Coe in his case against Buehler, reported in 110 Pa. 366. There the guarantor signed the guaranty at the instance of the agent of the guarantee. The contract guaranteed, though executed by the debtor, had not yet been signed by the guarantee. It was executed by him soon afterward, but no notice thereof was given to the guarantor. The Supreme Court held that absence of notice of acceptance was fatal and sustained a judgment of nonsuit. This is in harmony with the unbroken line of decisions preceding it and is conclusive of the question under consideration.

"It is urged that there is testimony from which the jury could find that defendant was interested in Mrs. Bierly's purchase—that the goods were, in fact, bought for him. We do not think so. Joseph Bensinger, the tenant of the hotel under McCormick and Seener, says he purchased from McCormick a one half interest in these goods, on December 13th, 1889. This was ten months after the sale to Mrs. Bierly. It was not shown how McCormick came by this one half interest or that he knew where the goods came from. The fair and natural presumption would be that he bought from Mrs. Bierly. There is nothing in plaintiff's testimony to show that McCormick ever, prior to the bringing of this suit, had knowledge that Evans & Company had sold the goods in question or any other goods to Mrs. Bierly. Plaintiffs could have shown how this was and it was their duty to do so.

"They seek to recover from McCormick, not as the original debtor, but as surety.

"In all cases, when a plaintiff seeks to make one man liable for the debt of another the case must be plainly made out.

Every ambiguity in the evidence weighs in favor of the defendant. *Kellogg v. Stockton & Fuller*, 29 Pa. 460.

"The rule is discharged."

Errors assigned were (1) entry of nonsuit; (2) refusal to take it off.

W. C. Kress for appellants.

Cline G. Furst for appellee.

Per CURIAM, April 1st, 1895.

The only error properly assigned is the refusal of the Court below to take off the judgment of nonsuit.

For reasons given by the learned president of the eighth judicial district, who specially presided at the hearing, we are satisfied that the rule to take off the compulsory nonsuit was rightly discharged.

The judgment is affirmed on his opinion.

(d) By whom offer must be accepted.

BOULTON v. JONES AND ANOTHER.

IN THE EXCHEQUER, NOVEMBER 25, 1857.

[*Reported in 2 Hurlstone & Norman* 564.]

ACTION for goods sold. Plea.—Never indebted.

At the trial before the Assessor of the Court of Passage at Liverpool, it appeared that the plaintiff had been foreman and manager to one Brocklehurst, a pipe hose manufacturer, with whom the defendants had been in the habit of dealing, and with whom they had a running account. On the morning of January 13th, 1857, the plaintiff bought Brocklehurst's stock, fixtures, and business, and paid for them. In the afternoon of the same day, the defendant's servant brought a written order, addressed to Brocklehurst, for three 50-feet leather hose 2½ in. The goods were supplied by the plaintiff. The plaintiff's book-keeper struck out the name of Brocklehurst and inserted the name of the plaintiff in the order. An invoice was afterward sent in by the plaintiff to the defendants, who said they knew nothing of him. Upon these facts, the jury, under direction of the Assessor, found a verdict for the plaintiff, and leave was reserved to the defendants to move to enter a verdict for them.

Mellish having obtained a rule *nisi* accordingly,

M' Oubrey now showed cause.

Mellish in support of the rule.

POLLOCK, C.B. The point raised is, whether the facts proved did not show an intention on the part of the defendants to deal with Brocklehurst. The plaintiff, who succeeded Brocklehurst in business, executed the order without any intimation of the change that had taken place, and brought this action to recover the price of the goods supplied. It is a rule of law, that if a person intends to contract with A., B. cannot give himself any right under it. Here the order in writing was given to Brocklehurst. Possibly Brocklehurst might have adopted the act of the plaintiff in supplying the goods, and maintained an action for their price. But since the plaintiff has chosen to sue, the only course the defendants could take was to plead that there was no contract with him.

MARTIN, B. I am of the same opinion. This is not a case of principal and agent. If there was any contract at all, it was not with the plaintiff. If a man goes to a shop and makes a contract, intending it to be with one particular person, no other person can convert that into a contract with him.

BRAMWELL, B. The admitted facts are, that the defendants sent to a shop an order for goods, supposing they were dealing with Brocklehurst. The plaintiff, who supplied the goods, did not undeceive them. If the plaintiff were now at liberty to sue the defendants, they would be deprived of their right of set-off as against Brocklehurst. When a contract is made, in which the personality of the contracting party is or may be of importance, as a contract with a man to write a book, or the like, or where there might be a set-off, no other person can interpose and adopt the contract. As to the difficulty that the defendants need not pay anybody, I do not see why they should, unless they have made a contract either express or implied. I decide the case on the ground that the defendants did not know that the plaintiff was the person who supplied the goods, and that allowing the plaintiff to treat the contract as made with him would be a prejudice to the defendants.

CHANNELL, B. In order to entitle the plaintiff to recover he must show that there was a contract with himself. The order was given to the plaintiff's predecessor in business. The plaintiff executes it without notifying to the defendants who it was who executed the order. When the invoice was delivered in the name of the plaintiff, it may be that the defendants were not in a situation to return the goods.

Rule absolute.

BOSTON ICE COMPANY v. EDWARD POTTER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JUNE 28,
1877.

[*Reported in 123 Massachusetts Reports 28.*]

CONTRACT on an account annexed, for ice sold and delivered between April 1st, 1874, and April 1st, 1875. Answer, a general denial.

At the trial in the Superior Court, before Wilkinson, J., without a jury, the plaintiff offered evidence tending to show the delivery of the ice and its acceptance and use by the defendant from April 1st, 1874, to April 1st, 1875, and that the price claimed in the declaration was the market price. It appeared that the ice was delivered and used at the defendant's residence in Boston, and the amount left daily was regulated by the orders received there from the defendant's servants; that the defendant, in 1873, was supplied with ice by the plaintiff, but, on account of some dissatisfaction with the manner of supply, terminated his contract with it; that the defendant then made a contract with the Citizens' Ice Company to furnish him with ice; that some time before April, 1874, the Citizens' Ice Company sold its business to the plaintiff, with the privilege of supplying ice to its customers. There was some evidence tending to show that the plaintiff gave notice of this change of business to the defendant, and informed him of its intended supply of ice to him; but this was contradicted on the part of the defendant.

The judge found that the defendant received no notice from the plaintiff until after all the ice had been delivered by it, and that there was no contract of sale between the parties to this action except what was to be implied from the delivery of the ice by the plaintiff to the defendant and its use by him; and ruled that the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company, and that the plaintiff could not maintain this action. The plaintiff alleged exceptions.

J. P. Farley, Jr., for the plaintiff.

E. C. Bumpus & E. M. Johnson for the defendant.

ENDICOTT, J. To entitle the plaintiff to recover, it must show some contract with the defendant. There was no express contract, and upon the facts stated no contract is to be implied. The defendant had taken ice from the plaintiff in 1873, but, on account of some dissatisfaction with the manner of supply, he terminated his contract, and made a contract for his supply with

the Citizens' Ice Company. The plaintiff afterward delivered ice to the defendant for one year without notifying the defendant, as the presiding judge has found, that it had bought out the business of the Citizens' Ice Company, until after the delivery and consumption of the ice.

The presiding judge has decided that the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company, and has thereby necessarily found that the defendant's contract with that company covered the time of the delivery of the ice.

There was no privity of contract established between the plaintiff and defendant, and without such privity the possession and use of the property will not support an implied *assumpsit*. *Hills v. Snell*, 104 Mass. 173, 177. And no presumption of assent can be implied from the reception and use of the ice, because the defendant had no knowledge that it was furnished by the plaintiff, but supposed that he received it under the contract made with the Citizens' Ice Company. Of this change he was entitled to be informed.

A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant, before receiving the ice, or during its delivery, had received notice of the change, and that the Citizens' Ice Company could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know. *Orcutt v. Nelson*, 1 Gray, 536, 542; *Winchester v. Howard*, 97 Mass. 303; *Hardman v. Booth*, 1 H. & C. 803; *Humble v. Hunter*, 12 Q. B. 310; *Robson v. Drummond*, 2 B. & Ad. 303. If he had received notice and continued to take the ice as delivered, a contract would be implied. *Mudge v. Oliver*, 1 Allen, 74; *Orcutt v. Nelson*, *ubi supra*; *Mitchell v. Lapage*, Holt N. P. 253.

There are two English cases very similar to the case at bar. In *Schmaling v. Thomlinson*, 6 Taunt. 147, a firm was employed by the defendants to transport goods to a foreign market, and

transferred the entire employment to the plaintiff, who performed it without the privity of the defendants, and it was held that he could not recover compensation for his services from the defendants.

The case of *Boulton v. Jones*, 2 H. & N. 564, was cited by both parties at the argument. There the defendant, who had been in the habit of dealing with one Brocklehurst, sent a written order to him for goods. The plaintiff, who had on the same day bought out the business of Brocklehurst, executed the order without giving the defendant notice that the goods were supplied by him and not by Brocklehurst. And it was held that the plaintiff could not maintain an action for the price of the goods against the defendant. It is said in that case that the defendant had a right of set-off against Brocklehurst, with whom he had a running account, and that is alluded to in the opinion of Baron Bramwell, though the other judges do not mention it.

The fact that a defendant in a particular case has a claim in set-off against the original contracting party shows clearly the injustice of forcing another person upon him to execute the contract without his consent, against whom his set-off would not be available. But the actual existence of the claim in set-off cannot be a test to determine that there is no implied *assumpsit* or privity between the parties. Nor can the non-existence of a set-off raise an implied *assumpsit*. If there is such a set-off, it is sufficient to state that, as a reason why the defendant should prevail; but it by no means follows that because it does not exist the plaintiff can maintain his action. The right to maintain an action can never depend upon whether the defendant has or has not a defence to it.

The implied *assumpsit* arises upon the dealings between the parties to the action, and cannot arise upon the dealings between the defendant and the original contractor, to which the plaintiff was not a party. At the same time, the fact that the right of set-off against the original contractor could not, under any circumstances, be availed of in an action brought upon the contract by the person to whom it was transferred and who executed it, shows that there is no privity between the parties in regard to the subject-matter of this action.

It is, therefore, immaterial that the defendant had no claim in set-off against the Citizens' Ice Company.

We are not called upon to determine what other remedy the plaintiff has, or what would be the rights of the parties if the ice were now in existence.

Exceptions overruled.

LUTHER J. B. LINCOLN v. ERIE PRESERVING
COMPANY.IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS,
JANUARY 3, 1882.*[Reported in 132 Massachusetts Reports 129.]*

CONTRACT for the non-delivery of 3000 cases of corn. Answer, the Statute of Frauds. Trial in the Superior Court, without a jury, before Bacon, J., who allowed a bill of exceptions in substance as follows :

The defendant is a corporation established in New York, engaged in packing fruits and vegetables. The plaintiff is a broker and dealer having his office in Boston. He had acted as broker for the defendant, and had also dealt with it in his own name.

On September 26th, 1879, the plaintiff signed and sent from Boston to the defendant the following telegram : "Telegraph how much corn you will sell, with lowest cash price, Buffalo." The defendant signed and sent from New York, on the same day, the following telegram : "Three thousand cases, \$1.05, open one week."

The plaintiff also signed and sent to the defendant, after the receipt of the above message, on the same day, the following telegram : "Sold corn, will see you to-morrow." There was no other memorandum in writing.

The plaintiff went to New York on September 27th, and had an interview with the defendant's treasurer and manager. The plaintiff offered to prove that at such interview he verbally accepted the offer contained in the telegrams ; that the defendant promised to ship the goods to him ; and that the last telegram referred to a resale by himself of the same corn to one Hooper.

The judge ruled that the plaintiff could not maintain an action upon the contract, because it was a contract for the sale of merchandise for the price of more than \$50, and there was no acceptance of any part of the goods, or giving anything in earnest to bind the bargain, or part payment, and no sufficient note or memorandum in writing of the bargain made and signed by the defendant, or by any one thereunto authorized, because the name of the purchaser was not disclosed in the writings ; and that no parol testimony could supplement the telegrams so as to bind the defendant to its offer ; and found for the defendant. The plaintiff alleged exceptions.

A. Hemenway for the plaintiff.

W. B. French for the defendant.

ALLEN, J. The telegrams do not contain any offer by the defendant to sell to the plaintiff. The plaintiff was a broker, and had acted as a broker for the defendant, and also had dealings with it on his own account. Construing the first two telegrams together, the defendant says to the plaintiff that it will sell a certain quantity of corn, on certain terms, and within a certain time; but it does not say that it will sell to the plaintiff. It says in effect that it will hold the corn for a week, for the plaintiff to find a purchaser. The plaintiff's reply confirms this construction, for he does not say that he will take the corn, but that he has sold it, and will see the defendant the next day. *Smith v. Gowdy*, 8 Allen, 566; *Champion v. Plummer*, 1 N. R. 252.

As there is no written evidence of any bargain or offer to sell the corn to the plaintiff, evidence of a subsequent oral promise by the defendant, or acceptance by the plaintiff, was properly excluded.

Exceptions overruled.

(e) *Necessity of certainty of terms.*

THE CHICAGO & GREAT EASTERN RAILWAY COMPANY, APPELLANT, *v.* FRANCIS B. DANE
AND OTHERS, RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, DECEMBER 20, 1870.

[*Reported in 43 New York Reports 240.*]

THIS is an appeal from a judgment of the General Term of the Supreme Court in the first judicial district, affirming a judgment for the defendant entered upon the report of a referee.

This action was brought to recover damages on an alleged contract of the defendant to carry and transport a quantity of railroad iron from New York to Chicago for the plaintiffs. The only evidence of the contract were the letters quoted in the opinion of the Court. The defendant insisted that the agreement was invalid for want of the proper United States internal revenue stamp affixed at the time it was made. But the referee overruled the objection, holding that it was sufficient under § 173 of the revenue act of June 30th, 1864, to stamp the instrument on its production in court. This point was not passed on in this court.

Titus & Westervelt for the appellant.

H. W. Johnson for the respondents.

GROVER, J. Whether the letter of the defendants to plaintiff, and the answer of plaintiff thereto (leaving the question of revenue stamps out of view), proved a legal contract for the transportation of iron by the defendants for the plaintiff from New York to Chicago upon the terms therein specified, depends upon the question whether the plaintiff became thereby bound to furnish any iron to the defendants for such transportation, as there was no pretence of any consideration for the promise of the defendants to transport the iron, except the mutual promise of the plaintiff to furnish it for that purpose, and to pay the specified price for the service. Unless, therefore, there was a valid undertaking by the plaintiff so to furnish the iron, the promise of the defendants was a mere nude pact, for the breach of which no action can be maintained. The material part of the defendants' letter affecting this question is as follows: "We hereby agree to receive in this port (New York), either from yard or vessel, and transport to Chicago, by canal and rail or the lakes, for and on account of the Chicago & Great Eastern Railway Company, not exceeding 6000 tons gross (2240 pounds) in and during the months of April, May, June, July, and August, 1864, upon the terms and for the price hereinafter specified." This letter was forwarded by the defendants to the plaintiff April 15th, 1864. On April 16th the plaintiff answered this letter, the material part of which was as follows: "In behalf of this company I assent to your agreement, and will be bound by its terms." We have seen that the inquiry is, whether this bound the plaintiff to furnish any iron for transportation. It is manifest that the word "agree" in the letter of the defendants was used as synonymous with the word "offer," and that the letter was a mere proposition to the plaintiff for a contract to transport for it any quantity of iron upon the terms specified, not exceeding 6000 tons, and that it was so understood by the plaintiff. The plaintiff was at liberty to accept this proposition for any specified quantity not beyond that limited; and had it done so, a contract mutually obligatory would have resulted therefrom, for the breach of which by either party the other could have maintained an action for the recovery of the damages thereby sustained. This mutual obligation of the parties to perform the contract would have constituted a consideration for the promise of each. But the plaintiff did not so accept. Upon the receipt of the defendants' offer to transport not to exceed 6000 tons upon the terms specified, it merely accepted such offer, and agreed to be bound by its terms. This amounted to nothing

more than the acceptance of an option by the plaintiff for the transportation of such quantity of iron by the defendants as it chose ; and had there been a consideration given to the defendants for such option, the defendants would have been bound to transport for the plaintiff such iron as it required within the time and quantity specified, the plaintiff having its election not to require the transportation of any. But there was no consideration received by the defendants for giving any such option to the plaintiff. There being no consideration for the promise of the defendants, except this acceptance by the plaintiff, and that not binding it to furnish any iron for transportation unless it chose, it follows that there was no consideration for any promise of the defendants, and that the breach of such promise furnishes no foundation for an action. The counsel for the defendants insists that the contract may be upheld for the reason that at the time the letters were written the defendants were engaged in transporting iron for the plaintiff. But this had no connection with the letters any more than if the defendants were at the time employed in any other service for the plaintiff. Nor does the fact that the defendants, after the letters were written, transported iron for the plaintiff at all aid in upholding the contract. This did not oblige the plaintiff to furnish any additional quantity, and consequently constituted no consideration for a promise to transport any such. The counsel for the appellant further insists that the letter of defendant was a continuing offer, and that the request of the plaintiff, in August, to receive and transport a specified quantity of iron was an acceptance of such offer, and that the premises then became mutually obligatory, if not so before. This position cannot be maintained. Upon receipt of the defendants' letter, the plaintiff was bound to accept in a reasonable time and give notice thereof, or the defendant was no longer bound by the offer. The judgment appealed from must be affirmed with costs.

All the judges concurring except ALLEN, J., who, having been of counsel, did not sit.

Judgment affirmed.

THE GREAT NORTHERN RAILWAY COMPANY *v.*
WITHAM.

IN THE COMMON PLEAS, NOVEMBER 6, 1873.

[Reported in Law Reports 9 Common Pleas 16.]

THE first count of the declaration stated that it was agreed by and between the plaintiffs and the defendant that the defendant should supply and sell and deliver to the plaintiffs at Doncaster Station, and that the plaintiffs should buy and accept of him, any quantity they might require and order of him during a period ending on October 31st, 1872, of certain descriptions of iron, at certain prices agreed on between them ; that all things were done and happened and existed, and times had elapsed, to entitle the plaintiffs to a performance by the defendant of his agreement and to maintain the action for the breach by him of the same as thereafter alleged ; yet that the defendant did not nor would supply and sell and deliver to the plaintiffs at Doncaster Station or elsewhere divers quantities of the said descriptions of iron, which the plaintiffs required and ordered of him during the said period, whereby the plaintiffs were obliged to procure quantities of iron from other persons at higher prices than those to be paid by them as aforesaid, and were otherwise injured.

Second count, that it was agreed by and between the plaintiffs and the defendant that the defendant should supply and sell and deliver to the plaintiffs at Doncaster Station, and that the plaintiffs should buy and accept of him, any quantity they might order of him for half the requirements of the plaintiffs during the said period ending on October 31st, 1872, of certain descriptions of iron, at certain prices agreed on between them ; that all things were done, etc., yet the defendant did not nor would supply and sell and deliver to the plaintiffs, as agreed on as aforesaid, divers quantities of the said descriptions of iron, which the plaintiffs ordered of him for half the requirements of the plaintiffs during the said period ending October 31st, 1872, whereby the plaintiffs were obliged to procure quantities of iron from other persons at higher prices than those to be paid as aforesaid, and were otherwise injured. Claim, £2000.

Pleas.—1. That it was not agreed by and between the plaintiffs and the defendant, as alleged. 2. That the plaintiffs did not require or order iron as in the declaration alleged.

There was also a demurrer to each count of the declaration, on the ground that it disclosed no consideration for the defendant's promise to supply the iron therein mentioned. Issue, and joinder in demurrer.

The cause was tried before Brett, J., at the sittings at Westminster after the last term. The facts were as follows : In October, 1871, the plaintiffs advertised for tenders for the supply of goods (among other things iron) to be delivered at their station at Doncaster, according to a certain specification. The defendant sent in a tender, as follows :

"I, the undersigned, hereby undertake to supply the Great Northern Railway Company, for twelve months from November 1st, 1871, to October 31st, 1872, with such quantities of each or any of the several articles named in the attached specification as the company's store-keeper may order from time to time, at the price set opposite each article respectively, and agree to abide by the conditions stated on the other side.

(Signed) "SAMUEL WITHAM."

The company's officer wrote in reply, as follows :

"MR. S. WITHAM :

"SIR : I am instructed to inform you that my directors have accepted your tender, dated, etc., to supply this company at Doncaster Station any quantity they may order during the period ending October 31st, 1872, of the descriptions of iron mentioned on the enclosed list, at the prices specified therein. The terms of the contract must be strictly adhered to. Requesting an acknowledgment of the receipt of this letter.

(Signed) "S. FITCH,
"Assistant Secretary."

To this the defendant replied :

"I beg to own receipt of your favor of 20th instant, accepting my tender for bars, for which I am obliged. Your specifications shall receive my best attention. S. WITHAM."

Several orders for iron were given by the company, which were from time to time duly executed by the defendant ; but ultimately the defendant refused to supply any more, whereupon this action was brought.

A verdict having been found for the plaintiffs.

Digby Seymour, Q.C., moved to enter a nonsuit.

KEATING, J. In this case Mr. Digby Seymour moved to enter a nonsuit. The circumstances were these : The Great Northern

Railway Company advertised for tenders for the supply of stores. The defendant made a tender in these words : " I hereby undertake to supply the Great Northern Railway Company, for twelve months, from etc. to etc., with such quantities of each or any of the several articles named in the attached specifications as the company's store-keeper may order from time to time, at the price set opposite each article respectively," etc. Some orders were given by the company, which were duly executed. But the order now in question was not executed ; the defendant seeking to excuse himself from the performance of his agreement, because it was unilateral, the company not being bound to give the order. The ground upon which it was put by Mr. Seymour was, that there was no consideration for the defendant's promise to supply the goods ; in other words, that, inasmuch as there was no obligation on the company to give an order, there was no consideration moving from the company, and therefore no obligation on the defendant to supply the goods. The case mainly relied on in support of that contention was *Burton v. Great Northern Railway Co.*¹ But that is not an authority in the defendant's favor. It was the converse case. The Court there held that no action would lie against the company for not giving an order. If before the order was given the defendant had given notice to the company that he would not perform the agreement, it might be that he would have been justified in so doing. But here the company had given the order, and had consequently done something which amounted to a consideration for the defendant's promise. I see no ground for doubting that the verdict for the plaintiffs ought to stand.

BRETT, J. The company advertised for tenders for the supply of stores, such as they might think fit to order, for one year. The defendant made a tender offering to supply them for that period at certain fixed prices ; and the company accepted his tender. If there were no other objection, the contract between the parties would be found in the tender and the letter accepting it. This action is brought for the defendant's refusal to deliver goods ordered by the company ; and the objection to the plaintiffs' right to recover is, that the contract is unilateral. I do not, however, understand what objection that is to a contract. Many contracts are obnoxious to the same complaint. If I say to another, " If you will go to York, I will give you £100," that is in a certain sense a unilateral contract. He has not promised to go to York. But if he goes, it cannot be doubted that he will be entitled to receive the £100. His going

¹ 9 Ex. 507 ; 23 L. J. (Ex.) 184.

to York at my request is a sufficient consideration for my promise. So, if one says to another, "If you will give me an order for iron, or other goods, I will supply it at a given price;" if the order is given, there is a complete contract which the seller is bound to perform. There is in such a case ample consideration for the promise. So, here, the company having given the defendant an order at his request, his acceptance of the order would bind them. If any authority could have been found to sustain Mr. Seymour's contention, I should have considered that a rule ought to be granted. But none has been cited. *Burton v. Great Northern Railway Co.*¹ is not at all to the purpose. This is matter of every day's practice; and I think it would be wrong to countenance the notion that a man who tenders for the supply of goods in this way is not bound to deliver them when an order is given. I agree that this judgment does not decide the question whether the defendant might have absolved himself from the further performance of the contract by giving notice.

GROVE, J. I am of the same opinion, and have nothing to add.

Rule refused.

MOULTON v. KERSHAW AND ANOTHER.

IN THE SUPREME COURT OF WISCONSIN, JANUARY 8, 1884.

[*Reported in 59 Wisconsin Reports 316.*]

APPEAL from the Circuit Court for Milwaukee County.

The case is thus stated by Taylor, J.:

"The complaint alleges that the defendants were dealers in salt in the city of Milwaukee, including salt of the Michigan Salt Association; that the plaintiff was a dealer in salt in the city of La Crosse, and accustomed to buy salt in large quantities, which fact was known to the defendants; that on September 19th, 1882, the defendants, at Milwaukee, wrote and posted to the plaintiff at La Crosse a letter, of which the following is a copy:

" 'MILWAUKEE, September 19, 1882.

" 'J. H. MOULTON, Esq., La Crosse, Wis.:

" 'DEAR SIR: In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt, in full carload lots of 80 to 95 barrels, delivered at your city, at 85 cents per barrel,

¹ 9 Ex. 507; 23 L. J. (Ex.) 184.

to be shipped per C. & N. W. R. R. Co. only. At this price it is a bargain, as the price in general remains unchanged. Shall be pleased to receive your order.

“ ‘ Yours truly,

“ ‘ C. J. KERSHAW & SON.’

“ ‘ The balance of the complaint reads as follows : ‘ And this plaintiff alleges, upon information and belief, that said defendants did not send said letter and offer by authority of, or as agents of, the Michigan Salt Association, or any other party, but on their own responsibility. And the plaintiff further shows that he received said letter in due course of mail, to wit, on September 20th, 1882, and that he, on that day, accepted the offer in said letter contained, to the amount of 2000 barrels of salt therein named, and immediately, and on said day, sent to said defendants at Milwaukee a message by telegraph, as follows :

“ ‘ LA CROSSE, September 20, 1882.

“ ‘ To C. J. KERSHAW & SON, Milwaukee, Wis.:

“ ‘ Your letter of yesterday received and noted. You may ship me two thousand (2000) barrels Michigan fine salt, as offered in your letter. Answer. J. H. MOULTON.

“ ‘ That said telegraphic acceptance and order was duly received by said defendants on September 20th, 1882, aforesaid ; that 2000 barrels of said salt was a reasonable quantity for this plaintiff to order in response to said offer, and not in excess of the amount which the defendants, from their knowledge of the business of the plaintiff, might reasonably expect him to order in response thereto.

“ ‘ That although said defendants received said acceptance and order of this plaintiff on said September 20th, 1882, they attempted, on September 21st, 1882, to withdraw the offer contained in their said letter of September 19th, 1882, and did, on said September 21st, 1882, notify this plaintiff of the withdrawal of said offer on their part ; that this plaintiff thereupon demanded of the defendants the delivery to him of 2000 barrels of Michigan fine salt, in accordance with the terms of said offer, accepted by this plaintiff as aforesaid, and offered to pay them therefor in accordance with said terms, and this plaintiff was ready to accept said 2000 barrels, and ready to pay therefor in accordance with said terms. Nevertheless, the defendants utterly refused to deliver the same, or any part thereof, by reason whereof this plaintiff sustained damage to the amount of \$800.

“ ‘ Wherefore the plaintiff demands judgment against the defendants for the sum of \$800, with interest from September 21st, 1882, besides the costs of this action.’

“ To this complaint the defendants interposed a general demurrer. The Circuit Court overruled the demurrer, and from the order overruling the same the defendants appeal to this court.”

Benjamin K. Miller for the appellants.

Jenkins, Winkler & Smith for the respondent, and oral argument by *Winkler*.

TAYLOR, J. The only question presented is whether the appellants' letter, and the telegram sent by the respondent in reply thereto, constitute a contract for the sale of 2000 barrels of Michigan fine salt by the appellants to the respondent at the price named in such letter.

We are very clear that no contract was perfected by the order telegraphed by the respondent in answer to appellants' letter. The learned counsel for the respondent clearly appreciated the necessity of putting a construction upon the letter which is not apparent on its face, and in their complaint have interpreted the letter to mean that the appellants by said letter made an express offer to sell the respondent, on the terms stated, such reasonable amount of salt as he might order, and as the appellants might reasonably expect him to order, in response thereto. If in order to entitle the plaintiff to recover in this action it is necessary to prove these allegations, then it seems clear to us that the writings between the parties do not show the contract. It is not insisted by the learned counsel for the respondent that any recovery can be had unless a proper construction of the letter and telegram constitute a binding contract between the parties. The alleged contract being for the sale and delivery of personal property of a value exceeding \$50, is void by the Statute of Frauds, unless in writing. Section 2308, R. S. 1878.

The counsel for the respondent claims that the letter of the appellants is an offer to sell to the respondent, on the terms mentioned, any reasonable quantity of Michigan fine salt that he might see fit to order, not less than one carload. On the other hand, the counsel for the appellants claim that the letter is not an offer to sell any specific quantity of salt, but simply a letter such as a business man would send out to customers or those with whom he desired to trade, soliciting their patronage. To give the letter of the appellants the construction claimed for it by the learned counsel for the respondent would introduce such an element of uncertainty into the contract as would necessarily render its enforcement a matter of difficulty, and in every

case the jury trying the case would be called upon to determine whether the quantity ordered was such as the appellants might reasonably expect from the party. This question would necessarily involve an inquiry into the nature and extent of the business of the person to whom the letter was addressed, as well as to the extent of the business of the appellants. So that it would be a question of fact for the jury in each case to determine whether there was a binding contract between the parties. And this question would not in any way depend upon the language used in the written contract, but upon proofs to be made outside of the writings. As the only communications between the parties, upon which a contract can be predicated, are the letter and the reply of the respondent, we must look to them, and nothing else, in order to determine whether there was a contract in fact. We are not at liberty to help out the written contract, if there be one, by adding by parol evidence additional facts to help out the writing so as to make out a contract not expressed therein. If the letter of the appellants is an offer to sell salt to the respondent on the terms stated, then it must be held to be an offer to sell any quantity at the option of the respondent not less than one carload. The difficulty and injustice of construing the letter into such an offer is so apparent that the learned counsel for the respondent do not insist upon it, and consequently insist that it ought to be construed as an offer to sell such quantity as the appellants, from their knowledge of the business of the respondent, might reasonably expect him to order.

Rather than introduce such an element of uncertainty into the contract, we deem it much more reasonable to construe the letter as a simple notice to those dealing in salt that the appellants were in a condition to supply that article for the prices named, and requesting the person to whom it was addressed to deal with them. This case is one where it is eminently proper to heed the injunction of Justice Foster in the opinion in *Lyman v. Robinson*, 14 Allen, 254: "That care should always be taken not to construe as an agreement letters which the parties intended only as preliminary negotiations."

We do not wish to be understood as holding that a party may not be bound by an offer to sell personal property, where the amount or quantity is left to be fixed by the person to whom the offer is made, when the offer is accepted and the amount or quantity fixed before the offer is withdrawn. We simply hold that the letter of the appellants in this case was not such an offer. If the letter had said to the respondent we will sell you all the Michigan fine salt you will order, at the price and on the

terms named, then it is undoubtedly the law that the appellants would have been bound to deliver any reasonable amount the respondent might have ordered, possibly any amount, or make good their default in damages. The case cited by the counsel decided by the California Supreme Court (*Keller v. Ybarra*, 3 Cal. 147) was an offer of this kind with an additional limitation. The defendant in that case had a crop of growing grapes, and he offered to pick from the vines and deliver to the plaintiff, at defendant's vineyard, so many grapes then growing in said vineyard as the plaintiff should wish to take during the present year at 10 cents per pound on delivery. The plaintiff, within the time and before the offer was withdrawn, notified the defendant that he wished to take 1900 pounds of his grapes on the terms stated. The Court held there was a contract to deliver the 1900 pounds. In this case the fixing of the quantity was left to the person to whom the offer was made, but the amount which the defendant offered, beyond which he could not be bound, was also fixed by the amount of grapes he might have in his vineyard in that year. The case is quite different in its facts from the case at bar.

The cases cited by the learned counsel for the appellants (*Beaupre v. P. & A. Tel. Co.*, 21 Minn. 155, and *Kinghorne v. Montreal Tel. Co.*, U. C. 18 Q. B., 60) are nearer in their main facts to the case at bar, and in both it was held there was no contract. We, however, place our opinion upon the language of the letter of the appellants, and hold that it cannot be fairly construed into an offer to sell to the respondent any quantity of salt he might order, nor any reasonable amount he might see fit to order. The language is not such as a business man would use in making an offer to sell to an individual a definite amount of property. The word "sell" is not used. They say, "we are authorized to offer Michigan fine salt," etc., and volunteer an opinion that at the terms stated it is a bargain. They do not say, we offer to sell to you. They use general language, proper to be addressed generally to those who were interested in the salt trade. It is clearly in the nature of an advertisement or business circular, to attract the attention of those interested in that business to the fact that good bargains in salt could be had by applying to them, and not as an offer by which they were to be bound, if accepted, for any amount the persons to whom it was addressed might see fit to order. We think the complaint fails to show any contract between the parties, and the demurrer should have been sustained.¹

¹ I am of opinion that the defendants are entitled to judgment. The action is brought against persons who issued a circular offering a stock for

BY THE COURT. The order of the Circuit Court is reversed, and the cause remanded for further proceedings according to law.

EUGENE S. SHEPARD *v.* HERBERT M. CARPENTER.

IN THE SUPREME COURT OF MINNESOTA, JULY 13, 1893.

[*Reported in 54 Minnesota Reports 153.*]

APPEAL by plaintiff, Eugene S. Shepard, from a judgment of the District Court of Hennepin County, William Lochren and Frederick Hooker, JJ., entered January 24th, 1893, that he take nothing by his action.

The defendant, Herbert M. Carpenter, of Minneapolis, on April 19th, 1892, agreed with plaintiff that he would enter into a contract with him whereby Shepard should agree to cut into logs, haul and deliver at the boom or other place of delivery to be in and by said contract agreed upon, all pine timber upon certain lands belonging to Carpenter in Townships 59 and 60, Range 26, in Itasca County, and there sell the same at not less than \$9 per 1000 feet, and pay to Carpenter one third of the selling price of the logs, to be paid within —— days after such sale should be made. The amount of timber or logs to be cut in any one year was to be agreed upon and expressed in such contract, and it was to be prepared and executed within ninety days thereafter, in case Shepard, on examining the timber, elected to enter upon the work, on these terms.

sale by tender, to be sold at a discount in one lot. The plaintiffs sent in a tender which turned out to be the highest, but which was not accepted. They now insist that the circular amounts to a contract or promise to sell the goods to the highest bidder—that is, in this case, to the person who should tender for them at the smallest rate of discount; and reliance is placed on the cases as to rewards offered for the discovery of an offender. In those cases, however, there never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was an offer to become liable to any person who before the offer should be retracted should happen to be the person to fulfil the contract of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. If the circular had gone on, “and we undertake to sell to the highest bidder,” the reward cases would have applied, and there would have been a good contract in respect of the persons. But the question is, whether there is here any offer to enter into a contract at all, or whether the circular amounts to anything more than a mere proclamation that the defendants are ready to chaffer for the sale of the goods, and to receive offers for the purchase of them. In advertisements for tenders for buildings it is not

Plaintiff examined the timber and elected to enter upon the work, and requested defendant to sign and execute a contract therefor pursuant to this agreement of April 19th, 1892; but defendant neglected, and finally refused. This action was to recover damages for the breach of that agreement. The complaint stated the foregoing facts, and attached to it was a copy of the agreement of April 19th, 1892. It also stated that there were not less than 18,000,000 feet of merchantable pine logs on the land, worth \$10 per 1000, and set forth the facts showing that his damages were \$73,534, for which sum he asked judgment.

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. After argument before the two judges the demurrer was sustained and judgment was entered for defendant. The plaintiff appeals.

Larrabee & Gammons for appellant.

W. H. Norris for respondent.

GILFILLAN, C.J. A contract between two persons, upon a valid consideration, that they will, at some specified time in the future, at the election of one of them, enter into a particular contract, specifying its terms, is undoubtedly binding, and upon a breach thereof the party having the election or option may recover as damages what such particular contract, to be entered into, would have been worth to him, if made. But an agreement that they will in the future make such contract as they

usual to say that the contract will be given to the lowest bidder, and it is not always that the contract is made with the lowest bidder. Here there is a total absence of any words to intimate that the highest bidder is to be the purchaser. It is a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt.—Willes, J., *Spencer v. Harding*, L. R. 5 C. P. 561, 563-564.

The defendant was admittedly the lowest bidder for the erection of defendant's building. It does not follow, however, that because he was the lowest bidder the defendant was bound to award him the contract. The fact that, upon the opening of the bids, either the architect or the defendant may have said to the plaintiff, "You are the lucky man," amounts to nothing more than a recognition of the fact that he was the lowest bidder. After the bids had been opened, it was the right of the defendant to inquire into the fitness and ability of the respective bidders to fulfil the contract. He was not bound to award it to a bidder who lacked either the skill, experience, or ability to properly perform the contract. In this case the contract never was awarded to the plaintiff. There were a number of questions to be settled when the defendant and the bidder were brought together, before their minds could be said to have agreed upon anything.

The learned judge below submitted the case to the jury under proper instructions, and their verdict is the end of the matter.—Per Curiam, *Leskie v. Haseltine*, 155 Pa. St. 98, 100.—ED.

may then agree upon amounts to nothing. An agreement to enter into negotiations, and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action. There would be no way by which the Court could determine what sort of a contract the negotiations would result in ; no rule by which the Court could ascertain whether any, or, if so, what, damages might follow a refusal to enter into such future contract. So, to be enforceable, a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as the result of future negotiations.

The agreement herein sued on leaves essential terms of the future contract to be fixed by future agreement. It clearly contemplated that the logs to be cut and hauled should be delivered at some one place, but it does not specify what place, but instead thereof provides that the (future) contract shall be for plaintiff to cut into logs, "haul and deliver at the boom or other place of delivery, to be in and by said contract agreed upon," without indicating what boom, or where it may be. The place of delivery was manifestly left to be agreed on, and, when agreed on, inserted in the future contract. How payments were to be made by plaintiff for logs sold by him was a matter of serious importance, but all the contract says of it is : "One third of the selling price thereof, in cash, to be paid within —— days after such sale shall be made." It is manifest the parties intended the future contract to specify the number of days within which payment or payments were to be made, but that they had not agreed on the number of days, and so left it to be agreed on and inserted in the future contract. A perhaps still more important matter was within what time the logs should be cut. All the contract says of that is "that the amount of timber or logs to be cut in any one year shall be agreed upon, and be expressed in said contract." Where a final contract fails to express some matter, as, for instance, a time of payment, the law may imply the intention of the parties ; but, where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties will agree upon.

Judgment affirmed.

HARVEY AND ANOTHER, PLAINTIFFS, v. FACEY AND OTHERS,
DEFENDANTS.

IN THE PRIVY COUNCIL, JULY 4, 29, 1893.

*On Appeal from the Supreme Court of Jamaica.**[Reported in Law Reports Appeal Cases (1893) 552.]*

APPEAL from a decree of the Supreme Court (June 18th, 1892) setting aside a decree of Curran, J. (February 8th, 1892), which dismissed the suit, which was one for specific performance of an alleged contract in writing.

The facts are stated in the judgment of their Lordships.

The respondents, Facey and his wife, denied the contract, and pleaded § 4 of the Statute of Frauds.

The question decided in appeal was whether the three telegrams set out in the pleadings constituted a binding agreement of sale and purchase.

The way in which the appeal came before their Lordships was, that on July 5th, 1892, the Supreme Court gave leave to appeal against so much of the decree as was based on L. M. Facey's want of authority to sell. On March 15th, 1893, special leave was granted by Her Majesty to appeal in respect of the damages awarded, but at the same time liberty was given to the respondents to contest the contract.

Horace Davey, Q.C., and F. Safford for the appellants.

Farwell, Q.C., and Stewart Smith for the respondents.

LORD MORRIS delivered the judgment of their Lordships. The appellants instituted an action against the respondents to obtain specific performance of an agreement alleged to have been entered into by the respondent, Larchin M. Facey, for the sale of a property named Bumper Hall Pen. The respondent, L. M. Facey, was alleged to have had power and authority to bind his wife, the respondent, Adelaide Facey, in selling the property. The appellants also sought an injunction against the Mayor and Council of Kingston to restrain them from taking a conveyance of the property from L. M. Facey.

The case came on for hearing before Curran, J., who dismissed the action with costs, on the ground that the agreement alleged by the appellants did not disclose a concluded contract for the sale and purchase of the property. The Court of Appeal reversed the judgment of Curran, J., and declared that a binding agreement for the sale and purchase of the property had been proved as between the appellants and the respondent,

L. M. Facey, but that the appellants had failed to establish that the said L. M. Facey had power to sell the said property without the concurrence of his wife, the said Adelaide Facey, or that she had authorized him to enter into the agreement relied on by the appellants, and that the agreement could not therefore be specifically performed, and the Court ordered that the appellants should have forty shillings for damages against L. M. Facey in respect of the breach of the agreement, with costs in both Courts against L. M. Facey in respect of the breach of the agreement.

The appellants obtained leave from the Supreme Court to appeal to Her Majesty in Council, and afterward obtained special leave from Her Majesty in Council to appeal in respect of a point not included in the leave granted by the Supreme Court, but the Order in Council provided that the respondents should be at liberty at the hearing, without special leave to contest the contract alleged in the pleadings and affirmed by the Court of Appeal.

The appellants are solicitors carrying on business in partnership at Kingston, and it appears that in the beginning of October, 1891, negotiations took place between the respondent, L. M. Facey, and the Mayor and Council of Kingston for the sale of the property in question, that Facey had offered to sell it to them for the sum of £900, that the offer was discussed by the council at their meeting on October 6th, 1891, and the consideration of its acceptance deferred; that on October 7th, 1891, L. M. Facey was travelling in the train from Kingston to Porus, and that the appellants caused a telegram to be sent after him from Kingston addressed to him "on the train for Porus," in the following words: "Will you sell us Bumper Hall Pen? Telegraph lowest cash price—answer paid;" that on the same day L. M. Facey replied by telegram to the appellants in the following words: "Lowest price for Bumper Hall Pen £900;" that on the same day the appellants replied to the last-mentioned telegram by a telegram addressed to L. M. Facey "on train at Porus" in the words following: "We agree to buy Bumper Hall Pen for the sum of £900 asked by you. Please send us your title deed in order that we may get early possession." The above telegrams were duly received by the appellants and by L. M. Facey. In the view their Lordships take of this case it becomes unnecessary to consider several of the defences put forward on the part of the respondents, as their Lordships concur in the judgment of Curran, J., that there was no concluded contract between the appellants and L. M. Facey to be collected from the aforesaid telegrams. The first telegram

asks two questions. The first question is as to the willingness of L. M. Facey to sell to the appellants; the second question asks the lowest price, and the word "Telegraph" is in its collocation addressed to that second question only. L. M. Facey replied to the second question only, and gives his lowest price. The third telegram from the appellants treats the answer of L. M. Facey stating his lowest price as an unconditional offer to sell to them at the price named. Their Lordships cannot treat the telegram from L. M. Facey as binding him in any respect, except to the extent it does by its terms—viz., the lowest price. Everything else is left open, and the reply telegram from the appellants cannot be treated as an acceptance of an offer to sell to them; it is an offer that required to be accepted by L. M. Facey. The contract could only be completed if L. M. Facey had accepted the appellant's last telegram. It has been contended for the appellants that L. M. Facey's telegram should be read as saying "yes" to the first question put in the appellants' telegram, but there is nothing to support that contention. L. M. Facey's telegram gives a precise answer to a precise question—viz., the price. The contract must appear by the telegrams, whereas the appellants are obliged to contend that an acceptance of the first question is to be implied. Their Lordships are of opinion that the mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at that price to the persons making the inquiry. Their Lordships will therefore humbly advise Her Majesty that the judgment of the Supreme Court should be reversed and the judgment of Curran, J., restored. The appellants must pay to the respondents the costs of the appeal to the Supreme Court and of this appeal.¹

¹ The instruction given by the Court to the jury, to the effect that the correspondence, taking either the statement of plaintiff or defendant as to the contents of plaintiff's first letter, constituted a contract, is erroneous. Defendant's evidence is to the effect that the letter simply inquired if he was the owner of the property, and the price thereof. It made no proposition to purchase, named no purchaser, and, in fact, contained nothing which could have been so understood. The answer to this letter simply states a price which defendant regards as "cheap," and the fact that it would be difficult to make a title at once. We do not understand the letter to contain a proposition to sell the lots. The mere statement of the price at which property is held cannot be understood as an offer to sell. The seller may desire to choose the purchaser, and may not be willing to part with his property to any one who offers his price. We regard the correspondence, taking it as given in defendant's testimony, so far as it goes, as amounting, on defendant's part, simply to a negotiation, and not to a binding offer. It required the acceptance by him of the offer contained in plaintiff's last letter to create a binding contract.—Per Beck, C.J., Knight *v.* Cooley, 34 Iowa, 219-220.—Ed.

PAGE v. NORFOLK.

IN THE COURT OF APPEAL, APRIL 17, 1894.

[*Reported in 70 Law Times Reports, New Series, 781.*]

APPEAL by the plaintiffs from a decision of Romer, J.¹
Finlay, Q.C., and *Neville, Q.C.* (*W. F. Hamilton* with them)
 for the appellants.

Hopkinson, Q.C., and *George Henderson* for the respondents,
 were not called upon to argue.

LINDLEY, L.J. I do not doubt that the parties in this case thought that they had contracted, because probably they did not know what a binding contract was. [His Lordship stated the facts of the case, and continued :] Now, why is that letter not a contract ? At first sight it certainly looks like a contract.

¹ The case before Romer, J., is reported as follows in 70 Law Times Reports, New Series, 23 :

By the following letter the plaintiffs, Nathaniel Page and James Lewis Wigan, sought to establish a concluded agreement for the purchase of the property therein stated :

“ DEPTFORD BREWERY, KENT, S.E., April 17, 1893.

“ We hereby offer you £145,000 for your business, such sum to include the freehold brewery and premises at Deptford, the 46 freehold and 6 leasehold houses enumerated in the list given to us, the book debts amounting to £5000, and the loans £7800, and all consumable and rolling stock, fixed and loose, plant, horses, drays, carts, and other effects, now used in connection with the business. This offer is made subject to our approving a detailed contract to be entered into. The purchase-money to be paid as to £95,000 in cash, and as to £20 in preference stock of the brewery company to be formed, and to £30,000 in debenture stock of the brewery company to be formed, purchase to be completed on or before June 24th next.

“ N. PAGE,
 J. LEWIS WIGAN.

“ We accept the above terms.

“ EDWARD NORFOLK,
 CHARLES NORFOLK.”

The defendants had the letter stamped as an agreement.

On April 24th, 1893, the defendants gave notice to the plaintiffs that they withdrew from the negotiation, as they termed it. The company referred to in the letter was never formed. The plaintiffs waived any detailed contract, stated that they were willing to carry out the contract, and claimed a declaration for specific performance of the agreement contained in the letter.

By their statement of defence, the defendants denied the agreement, saying that the letter was negotiation only. They also pleaded that no agreement had been come to as to the capital or memorandum or articles of association of the company, or as to the amount of the stock to be issued ; or as to the title which the defendants were to show to the property. There was

It contains an offer and an acceptance. The reason why it is not a contract is this : You cannot read it without seeing that, not only does it stipulate that a detailed contract is to be entered into, but also that various important details are left open to be discussed and settled. There are very important matters indeed to be discussed, agreed on, and settled. The price which was to be paid was settled, and also the date of completion. But the price was not to be wholly paid in cash. It

evidence that the question of the amount of the deposit and other matters not appearing in the letter had been discussed, and left for future arrangement.

ROMER, J. In my judgment the action fails. I think there was no concluded agreement between the parties which can be enforced at law. No doubt they had agreed to the main heads of the contract, and, at the time when the letter of April 17th, 1893—which contained the heads of the contract—was signed, the parties thought that they had bound themselves to these heads, and probably thought that they had contracted in some shape or form ; but I think they intended that further terms should be discussed and settled and approved before they should be finally bound. The terms of the letter which were accepted included a provision that the plaintiffs' offer was to be made "subject to our approving a detailed contract to be entered into." It is common ground that it was contemplated that the detailed contract would be prepared by the vendors' solicitors, and submitted to the purchasers. It is also common ground that the contract would contain details going beyond the heads contained, or referred to, in the letter ; and it is clear that if these further terms were to be inserted on behalf of the plaintiffs, until the detailed contract was approved by the plaintiffs they would not be bound, and there would be no contract. I think it is also, to my mind, clear, that if the plaintiffs were not bound, neither were the defendants. This is not a case where there is some reference to a formal contract to carry out the terms which have been agreed upon and mentioned. It is a different case. It is a case where there is a reference to a further document to contain other terms, and a case where that further document is to be a contract entered into and approved, and it is only subject to such reference that the parties have come to any arrangement at all. In the particular case before me, there were many details which were of necessity left to be arranged and discussed. I may mention the deposit : for with regard to that the plaintiffs' own evidence was to the effect that they had arranged to give to the defendants a very substantial deposit. And there were also other terms in addition, which no doubt would have to be considered by the defendants if they had gone so far as to prepare a detailed contract, which would have been also considered by the plaintiffs when that detailed contract came before them. For example, the provision as to the title, as to the new company, as to its stock, its debentures, or its debenture stock. Many other points besides those which I have enumerated might be mentioned. On these grounds I have come to the conclusion that the parties have not finally bound themselves to the heads of agreement which the plaintiffs seek to enforce in this case—that is to say, the heads mentioned in the letter, disregarding altogether the provision as to the further contract. For these reasons, there being no concluded agreement, the action fails, and must be dismissed, but I dismiss it without costs.—ED.

was to be paid partly in preference stock and partly in debenture stock of a company which was to be formed. All those details were left unsettled, and could not be settled then. They were matters that could not be settled without a further document being prepared. That is the cardinal feature of the case. That which the parties had still to do was the essence of the bargain. It is not only because the letter stipulates that the "offer is made subject to our approving a detailed contract to be entered into."¹ The question is, subject to what? The detailed contract was to be entered into not merely for the purpose of formally expressing that which had been already agreed upon, but to embody terms which had not yet been agreed upon. As regards the authorities, there is the well-known case of *Hussey v. Horne-Payne* (41 L. T. Rep. N. S. 1; 8 Ch. Div. 670; 4 App. Cas. 311), where the defendant made an offer by letter to sell an estate to the plaintiff, which offer the plaintiff accepted by letter "subject to the title being approved by my solicitor." It was held that those words were not merely an expression of what would be implied by law, but constituted a new term; that the plaintiff's letter, therefore, was not an acceptance, but a new offer which had never been accepted; and that there was no binding contract. Again, in *Winn v. Bull* (7 Ch. Div. 29) the defendant agreed in writing to take a lease of the plaintiff's house "subject to the preparation and approval of a formal contract." No other contract was ever entered into between the parties; and it was held that there was no final agreement of which specific performance could be enforced against the defendant. A very similar case was *Hawkesworth v. Chaffey* (54 L. T. Rep. N. S. 72; 55 L. J., Ch. 335), in which *Winn v. Bull* (*ubi supra*) was followed. I think, therefore, that the decision of Romer, J., was right, and that this appeal must be dismissed with costs.

LOPES, L.J. I am of the same opinion. I do not think that this letter constitutes a binding contract between the parties of which specific performance can be enforced. No doubt some items are settled. But, to my mind, there are a vast number of things to be agreed on and settled which are not touched upon by this contract—matters relating to the brewery company to be formed. There was no company in existence at the date of

¹ It is contrary to the essence of an obligation, that it should depend upon the pure and single will of the person who is supposed to have contracted it, but it may depend upon the pure and single will of a third person; therefore I may effectually contract an obligation to give or do some thing if a third person consents to it. —1 Pothier on Obligations, Evans's Translation, 205.—Ed.

the letter. A vast number of matters of detail were to be agreed on in regard to that company. Then there are the express words in the contract that the offer is made subject to the plaintiffs approving a detailed contract to be entered into, showing that in the minds of the parties there were matters left open to be discussed. This is a much stronger case than *Winn v. Bull* (*ubi supra*), where the words were, "subject to the preparation and approval of a formal contract." Having regard to the nature and subject-matter of this contract, to the fact that no company had yet been formed, and to the other circumstances, this appears to me a much stronger case than *Winn v. Bull* (*ubi supra*). I therefore think that this appeal fails.

KAY, L.J. Where a contract is made as this is, subject to something to be done subsequently, then *primâ facie* that must be done before the contract can be regarded as complete. Here the words are: "This contract is made subject to our approving a detailed contract to be entered into." The contract related to the intended purchase of a brewery business. It was argued that reference to the formal contract was made merely for the purpose that such terms should be put into proper legal form; and, therefore, that it was not a condition which made the contract not a completed one. The condition is, that a detailed contract is to be approved by both parties. The agreement is made subject to the condition that a detailed contract is to be approved. Before both parties could agree on the detailed contract there would be several matters to be discussed and further gone into. In truth, this letter, though signed by both parties, contains no more than the heads of an agreement which were to be discussed and settled by both parties before there would be any concluded agreement. In my opinion, therefore, the learned judge in the Court below was quite right; and consequently this appeal fails and must be dismissed with costs.

Appeal dismissed.

(f) *Acceptance must be in terms of offer.*

APPLEBY v. JOHNSON.

IN THE COMMON PLEAS, FEBRUARY 6, 1874.

[*Reported in Law Reports, 9 Common Pleas 158.*]

ACTION against the defendant, a calico-printer at Manchester, for alleged wrongful dismissal of the plaintiff, a salesman, from his service.

The cause was tried before Brett, J., at the last Summer

Assizes at Manchester, when the following letters were relied upon by the plaintiff as containing the terms of his engagement by the defendant :

“ September 21, 1871.

“ J. APPLEBY, Esq.:

“ DEAR SIR : Referring to my conversation with you, I have now the pleasure to state my willingness to enter the service of your firm for one year on trial, on the following terms—viz., a list of the merchants to be regularly called on by me to be made, and corrected as occasion requires. My salary for the year to be £120, and in addition a commission of $\frac{1}{2}d.$ per piece on all sales effected or orders taken by myself ; also on all return orders received for patterns given out directly by me to any of my customers, whether such orders are received by me or others ; and $\frac{1}{4}d.$ per piece to be allowed to me on all casual sales made in your warehouse by others than myself to any of my regular list of customers.

“ If the terms herein specified are in accordance with your ideas, kindly confirm them by return, and I will then prepare to enter on my duties at your warehouse on Monday morning next ; and trust by energetic and persevering work to effect a mutually favorable result to the engagement.

(Signed)

“ A. J. JOHNSON.”

“ September 22, 1871.

“ MR. A. J. JOHNSON :

“ DEAR SIR : Yours of yesterday embodies the substance of our conversation and terms. If we can define some of the terms a little clearer, it might prevent mistakes ; but I think we are quite agreed on all. We shall, therefore, expect you on Monday.

(Signed)

J. APPLEBY.

“ P.S. I have made a list of customers, which we can consider together.”

The plaintiff accordingly entered into the defendant's service as salesman on September 25th, 1871, and the defendant supplied him with a list of customers upon whom he was to call. He continued in the defendant's employ down to March, 1872, without any disagreement. But, in consequence of some dispute as to commission on certain orders, the plaintiff about this time intimated to the defendant that he should terminate his engagement at the expiration of the year for which he was engaged.

On May 3d, 1872, the defendant gave the plaintiff a month's notice to quit, relying upon a supposed custom of the trade.

Evidence was offered on the part of the defendant, that, at an interview between the parties after the interchange of the above letters, and before the service was entered upon, it was verbally agreed that the hiring should be subject to the customary month's notice.

The learned judge, however, ruled that the contract was complete by the two letters of September 21st and 22d, 1871, subject only to the terms being more clearly expressed, but not to any alteration of those terms: and he accordingly refused to receive the evidence tendered.

A verdict having been found for the plaintiff for £65 15s. 5d., *Pope, Q.C.*, in Michaelmas Term last, obtained a rule *nisi* for a new trial, on the ground of the improper rejection of evidence. *Herschell, Q.C.*, and *Taylor* showed cause.

Pope, Q.C., and *Hopwood* in support of the rule.

KEATING, J. The question is, whether the two letters of September 21st and 22d, 1871, constituted a complete contract between the parties; because there can be no dispute that, if there was a complete contract in those letters, the contract being one for which writing is necessary, that contract could not be varied by anything which subsequently passed between the parties by word of mouth. After full consideration, I have come to the conclusion that those letters do not constitute a complete contract. The plaintiff, who was proposing to enter into the service of the defendant as salesman, writes, "I have the pleasure to state my willingness to enter the service of your firm for one year on trial, on the following terms." The first term is, "A list of merchants to be regularly called on by me to be made, and corrected as occasion requires." No doubt, corrections would from time to time be required. But the list was in the first instance to be made. The letter goes on, "My salary for the year to be £120, and in addition a commission of $\frac{1}{2}d.$ per piece on all sales effected or orders taken by myself, also on all return orders received for patterns given out directly by me to any of my customers, whether such orders are received by me or others." I take the meaning of that to be, that, besides the stipulated salary, the plaintiff was to have a commission of $\frac{1}{2}d.$ per piece on all orders procured by him from the customers named in the list to be made out. It then goes on, "and $\frac{1}{4}d.$ per piece to be allowed to me on all casual sales made in your warehouse by others than myself to any of my regular list of customers." There was, therefore, as it seems to me, to be an appropriation of a set of customers upon whose dealings the plaintiff was to have a commission. Then the letter concludes, "If the terms herein ex-

pressed are in accordance with your ideas, kindly confirm them by return, and I will then prepare to enter on my duties at your warehouse on Monday morning next." The defendant's answer is as follows: "Yours of yesterday embodies *the substance* of our conversation and terms. If we can define some of the terms a little clearer, it might prevent mistakes; but I think we are quite agreed on all. We shall, therefore, expect you on Monday." I do not think that is the way in which mercantile men usually make a contract. My opinion of the letter, stopping there, is, that it is not an unconditional and definitive acceptance of the plaintiff's proposal, or, as the plaintiff puts it, a confirmation of his letter. Then comes this postscript, "I have made a list of customers, which we can consider together." That has reference to an important term in the proposed contract—viz., the amount of the commission, which was to be the subject of further discussion. It seems to me, therefore, that the two letters did not constitute a complete contract, and consequently that the foundation of Mr. Herschell's argument fails. I may say that my Brother Brett at *nisi prius* took a different view. He thought the letters constituted a complete contract, and that no new terms could be added by parol evidence, and consequently he rejected it. It seems to me that he was wrong, and that the rule must be made absolute.

GROVE, J. I am of the same opinion. Questions of this sort are constantly arising. Where a contract is to be made out by an offer on one side and an acceptance on the other, if the answer is equivocal or anything is left to be done, the two do not constitute a binding contract. It seemed to me very early in the argument that the letter of September 22d did not amount to an unequivocal acceptance of the offer contained in the plaintiff's letter of the 21st. The second letter refers to terms which required to be further considered, to make a final agreement. If the acceptance is not clear and certain, but leaves something to be arranged, something for future discussion and decision, the parties are not *ad idem*. Some stress has been laid on the words in the defendant's letter, "We shall, therefore, expect you on Monday." But those words do not show that there was a conclusive acceptance of the plaintiff's offer. Then comes the postscript, which is not unimportant: it shows that there were some of the elements of a contract which remained to be settled and ascertained between the parties, something that was still *in fieri*. It involves something which may be an alteration—a more clearly defining of something which may be the essence of the contract. In fact, one of the most important terms—viz., the amount of commission the plaintiff was to receive, is left

undefined. I cannot say that the defendant has by his letter done what the plaintiff asked him to do—viz., confirm his offer. There was, therefore, no complete agreement, and the rule for a new trial must be made absolute.¹

Rule absolute.

CROSSLEY v. MAYCOCK.

IN CHANCERY, BEFORE SIR GEORGE JESSEL, M.R., FEBRUARY 18,
1874.

[*Reported in Law Reports, 18 Equity Cases 180.*]

DEMURRER.

This was a suit by vendors for the specific performance of a contract for the sale of land.

The bill alleged that the defendants offered to purchase the plot of land in question by a letter dated October, 1873, which was in the following terms :

“ We beg to submit our offer for the plot of land on the east side of Tuel Lane—viz., £2 per yard superficial ; the purchase to be completed and possession given up on or before January 21st, 1874.”

That the plaintiffs sent the following answer to the defendants, dated October 27th, 1873 :

“ We are in receipt of your note offering us £2 per superficial yard for the plot of land on the east side of Tuel Lane, which offer we accept, and now hand you two copies of conditions of sale, which we have signed ; we will thank you to sign same, and return one of the copies to us.”

That the conditions of sale referred to in the above letter (which were set out in the bill) were prepared in duplicate, signed by the plaintiffs, and enclosed with the letter to the defendants, and after reciting that the plaintiffs had agreed to sell and the defendants to buy the piece of land therein described, various stipulations were made as to the delivery of the abstract, the time within which objections should be made to the title, and the time when the purchase should be completed.

That the defendants did not sign the agreement containing the conditions of sale, and that they subsequently refused to complete the contract.

The bill prayed a declaration that the said two letters created

¹ The opinion of Honyman, J., has been omitted.—ED.

a binding contract for the sale and purchase of the said plot of land, which ought to be specifically performed.

Southgate, Q.C., and *North* in support of the demurrer.

Fry, Q.C., and *Joliffe* in support of the bill.

JESSEL, M.R. The only question in this case is, what is the true construction of the letter of the plaintiffs of October 27th, 1873. The defendants had written to the plaintiffs, offering to purchase the land in question, to which the plaintiffs replied as follows :

“ We are in receipt of your note offering £2 per yard for the plot of land, which offer we accept, and now hand you two copies of conditions of sale, which we have signed ; we will thank you to sign same, and return one of the copies to us.”

The principle which governs these cases is plain. If there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into some more formal terms, the mere reference to such a proposal will not prevent the Court from enforcing the final agreement so arrived at. But if the agreement is made subject to certain conditions then specified or to be specified by the party making it, or by his solicitor, then, until those conditions are accepted, there is no final agreement such as the Court will enforce.

Here the allegation is that the agreement was subject to certain conditions of sale, which were very special, and such as no purchaser would be bound to accept under an open contract. I am of opinion that the acceptance was only conditional, and that there was no final contract.

The demurrer must be allowed.

BAKER v. HOLT.

IN THE SUPREME COURT OF WISCONSIN, NOVEMBER 21, 1882.

[*Reported in 56 Wisconsin Reports 100.*]

APPEAL from the Circuit Court for Wood County.

The case is stated in the opinion.

George L. Williams and *P. L. Spooner* for the appellant, and oral argument by *Spooner*.

L. P. Powers for the respondent.

TAYLOR, J. This action is brought to compel the specific performance of a contract for the sale of real estate which the plaintiff claimed he had purchased from the defendant. The

plaintiff resided at Centralia, in this State, and the defendant at Hartford, Conn. The contract, if any, was made by correspondence through the mail. The following are copies of the letters and telegram which plaintiff claims made the contract of sale :

“ HARTFORD, CONN., October 24, 1881.

“ C. O. BAKER :

“ DEAR SIR : Your letter came to hand a few days ago, but I have delayed answering it owing to my being sick. In regard to my land, I have had letters from one or two other parties within a month wanting to buy it. I have told them I was not ready to sell yet, but if you want to buy now I will tell you just what I will do. I will sell the whole 120 acres for \$800 ; one fourth cash down, and the balance in three equal notes, payable in one, two, and three years, with interest at 6 per cent. The notes to be secured by mortgage back on the land. This is my offer, if you want it now. I would not agree to keep the offer good a great while. I remain very truly yours,

“ THOMAS R. HOLT,

“ 29 Benton Street, Hartford, Conn.”

“ CENTRALIA, WIS., November 7, 1881.

“ THOMAS R. HOLT, Esq., Hartford, Conn.:

“ DEAR SIR : Yours of October 24th is at hand and contents noted. I will take your land at the figures named and upon the terms mentioned in your letter—\$800 for the 120 acres ; \$200 on receipt of deed and \$600 in three annual payments of \$200 each, with interest at 6 per cent ; security back on the land. You may make out the deed, leaving the name of the grantee in blank, and forward the same to I. L. Mosher, Esq., county treasurer of Wood County, at Grand Rapids, Wis., or to your agent, if you have one here, to be delivered to me on payment of the \$200 and the delivery of the necessary security. You will confer a favor by notifying me whether you still hold your offer good, and to whom you will send the deed, at your earliest convenience.

“ Yours truly,

“ C. O. BAKER.”

“ CENTRALIA, WIS., November 10, 1881.

“ THOMAS R. HOLT, 29 Benton Street :

“ Have written you, will take land at your figures. Answer.

“ C. O. BAKER.”

The evidence shows that it takes four days to transmit by mail a letter from Centralia to Hartford, and the same time

from Hartford to Centralia. It also shows that on November 10th, and before he received the letter of plaintiff, dated the 7th of the same month, and before the telegram was received, the defendant wrote again to the plaintiff, notifying him that he had concluded not to sell the land at the price named in his letter of October 24th, and that after the receipt by the plaintiff of defendant's letter of November 10th, and on the 14th of said month, plaintiff wrote and mailed to the defendant the following letter :

“ CENTRALIA, WIS., November 14, 1881.

“ THOMAS R. HOLT, Hartford, Conn.:

“ DEAR SIR : Yours of November 10th is at hand and contents noted. Will you make me your *lowest* cash offer on your land, to hold good at least twenty days, that I may have time in which to signify my acceptance of the offer, if considered reasonable ; \$800 is about all the land is worth, and I would not give much more for it. Let me hear from you by return mail, and oblige, yours truly,

C. O. BAKER.”

The answer of the defendant admitted all the facts above stated, and for the purposes of this case it is also presumed that the answer admits that the plaintiff wrote the defendant a letter of inquiry, as stated in his complaint, in which letter the lands of the defendant were properly described as alleged in said complaint. The plaintiff demurred to the answer on the ground that it did not state facts sufficient to constitute a defence. The Circuit Court sustained the demurrer, and from the order sustaining the same the defendant appeals to this Court. This ruling can only be sustained upon the ground that the plaintiff's letter of November 7th was an unqualified acceptance of the offer to sell made by the defendant in his letter of October 24th, or that the telegram of November 10th was such an acceptance.

We are of the opinion that the Court erred in construing the letter of November 7th as an unqualified acceptance of the defendant's offer, and that the two letters constituted a binding contract of sale. The defendant's offer entitled him to have the money paid to him at Hartford, and the notes and mortgage delivered there, and to deliver his deed there and not at Centralia, or any other place in Wisconsin. This construction of the defendant's letter is not controverted by the learned counsel for the respondent ; but he insists that what is said in the plaintiff's letter about sending the deed to the treasurer of Wood County, or his agent in said county, if he had one, executed in blank as to the name of the grantee, and the payment of the money and the delivery of the notes and mortgage to his agent

in said county, is merely suggested as a convenient way of carrying out the agreement, and not as conditions of his acceptance of the offer. We think the letter of the plaintiff is not susceptible of the construction given it by the learned counsel. We are clearly of the opinion that the defendant could not have compelled the plaintiff to perform the contract on his part unless he had remitted the deed to the treasurer of Wood County, or to some agent appointed by him there, executed in blank as to the grantee, and have demanded the payment of the money and the delivery of the security there, and not at his residence at Hartford, Conn. We are unable to distinguish this case from the case of the Northwestern Iron Co. v. Mead, 21 Wis. 474; and it is clearly distinguishable from the case of *Matte-son v. Scofield*, 27 Wis. 671.

In the case last cited, the purchaser, in his letter of acceptance, states that he has deposited the money in a bank in Milwaukee, and requested the deed to be sent to the bank for him; but he adds: "I suggest this method of making the transfer, as it saves time and expense." This statement in the letter of acceptance shows that it was not intended to qualify his previous unconditional acceptance of the vendor's offer, and in addition the vendor acknowledged the receipt of the letter of acceptance and made no objection to it in any way, nor did he withdraw his offer, but stated that he had made up his mind to come to Hudson and do the business in person. In the case at bar the defendant waived nothing; and, in fact, before he received the plaintiff's letter of acceptance wrote another letter withdrawing his offer. It is probably true that he could not withdraw his offer so as to bind the plaintiff if the plaintiff had in proper time mailed his letter to defendant containing an unqualified acceptance of his offer. But this letter of the defendant withdrawing his offer is proper evidence tending to show that he waived none of the terms of his original offer. The telegram was no more an absolute acceptance than the letter. It refers to the letter as containing plaintiff's acceptance of his offer, and if that letter is not an unconditional acceptance the telegram does not help it.

We think there was another question in the case—viz., Was the acceptance made in time? The defendant's letter clearly intimated that he required an immediate reply to his offer. He notifies the plaintiff that he has inquiries for the land from other parties, and that if plaintiff wants to buy now he will sell, etc. The plaintiff must have received the defendant's letter as early as October 28th or 29th, and he did not write his letter of acceptance until November 7th, either nine or ten days after its re-

ceipt, and in this letter the plaintiff seems to entertain a doubt as to whether his letter of acceptance was in time, and closes it with the following inquiry : " You will confer a favor by notifying me whether you still hold your offer good, and to whom you will send your deed, at your earliest convenience." We have serious doubts whether the letter of acceptance was mailed in time ; but we prefer to put our decision upon the ground that the letter was not an unconditional acceptance of the defendant's offer.

For the reason stated, the Court erred in sustaining the demurrer to the defendant's answer.¹

BY THE COURT. The order of the Circuit Court is reversed, and the cause remanded for further proceedings according to law.

¹ The written agreement between Stitt on the one part, and Backus & Morse on the other, is in the record. It is an agreement, in effect, that if Backus & Morse shall elect to buy all or any part of the several tracts of land included in the conveyance in escrow to Stitt, within four days, they may do so at the price of \$55 per acre, on depositing with Drake Brothers the sum of \$10,000 ; the remainder to be paid within sixty days after the first deposit. On the last of these four days, it appears by an indorsement made by Drake Brothers on this contract, that Backus & Morse paid in the \$10,000, and elected to take the whole of the lands ; the \$10,000 to be returned if the title was not found to be good, and forfeited to Stitt if the balance of the purchase-money was not paid within the time stipulated.

By the agreement as originally made and signed by Stitt, Backus, and Morse, the latter are bound to nothing. They had an option for four days of all or any part of the land at \$55 per acre, and they had sixty days after their election was made to pay the principal part of the purchase-money. By their payment of the \$10,000, they placed themselves in relation to Stitt in a position where they could forfeit the \$10,000, and thereby release themselves, or pay the balance within sixty days and claim a conveyance of the land. Looking to these papers as the proper evidence of the contract between Stitt, on the one part, and Backus & Morse on the other, it is clear that there was never any obligation on the part of the latter to take the land and pay for it at a definite price ; that by forfeiting the \$10,000 they could be released from any further performance of that agreement.

This statement of the nature of that contract is sufficient to show that it was no compliance with the outstanding offer of the defendants to Stitt.

They had never offered to accept any such contingent or optional contract of purchase, nor had they agreed to accept of any contract on time. Forty thousand dollars paid into Drake & Brother's hands was the only valid acceptance of their offer which could bind them.—Miller, J., *Stitt v. Huidekopers*, 17 Wall. 384, 396-397.—ED.

THE SCHENECTADY STOVE COMPANY, RESPONDENT, v.
HOLBROOK ET AL., APPELLANTS.IN THE COURT OF APPEALS OF NEW YORK, DECEMBER 22,
1885.*[Reported in 101 New York Reports 45.]*

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made June 1st, 1883, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover a balance alleged to be due for goods sold and delivered to defendants' firm. Defendants set up, as a counter-claim, damages for an alleged failure on the part of plaintiff to perform a contract for the sale and delivery of other goods.

On August 15th, 1879, the firm of Holbrook, Merrill & Stetson, composed of defendants, wrote plaintiff, asking for "best prices on hollow-ware, delivered in New York." On August 16th, 1879, plaintiff answered, enclosing catalogue, and offering the goods at a discount from catalogue prices as follows: "Sixty per cent, and 10 per cent cash thirty days, but this price only to hold good till September 30th."

In September following, one Clute, an agent of the plaintiff, called upon defendants, and made some modification in the prices. On September 25th sent an order with directions to "make five or six shipments of above, to New York," the first one soon as convenient, the others to follow ten days or two weeks apart, also giving directions as to the manner of putting up and marking the goods. On September 25th plaintiff wrote to defendants as follows: "Our Mr. Clute has just returned and reported the conversation he had with you, in respect to your order of 22d instant, but he leaves us in doubt as to how it is to be invoiced, at 60 per cent and 10 per cent cash, or 60 per cent and 5 per cent six months flat note." On September 27th defendants sent another order to be put up and shipped the same as directed in reference to the first order, adding this statement: "The price Mr. Clute gave us was 65 per cent six months, or 3½ per cent cash." On September 29th plaintiff returned the order, writing as follows: "You must be mistaken in discount Mr. Clute gave you. He positively asserts it was 60 per cent, and 5 per cent six months' note. We cannot, therefore, ship any ware until you inform us whether we are to invoice at 60 per cent and 10 per cent cash, or 60 per cent and

5 per cent six months' note. We return order of 27th, as it is beyond our power to accept it." Several other letters passed between the parties, each reiterating their views as to the offer made by Mr. Clute. On October 3d defendants wrote: "You can invoice the ware as you choose, either at the cash price or the six months' price." Plaintiff filled the first order, and the action was to recover a balance unpaid thereon.

Jesse Johnson for appellants.

Elihu Root for respondent.

RUGER, C.J. It is quite obvious that no contract was ever made between the parties with respect to the sale of the goods described in the order of September 27th. Their minds never met as to some of the elements necessary to constitute a valid contract. The catalogue of prices, containing a statement of terms of sale, delivered to defendants by plaintiff in August, contained no proposition, as to the amount of goods which the plaintiff was willing to sell, on the terms stated, and until an offer is made by one party, complete and definite in all material terms, it is not possible for another to make a valid contract by the mere acceptance of a proposition. In other words, so long as there remains any of the material conditions of a contract to be settled and agreed upon, no binding agreement exists.

In both of the orders in question certain stipulations were imposed by the buyers, outside of terms and prices, which required an assent on the part of the vendor to make a valid executory contract of sale. Thus, the vendees required the goods to be put up in a particular manner, in bundles of uniform size, with only a certain number of articles in each bundle, and that the goods should be shipped to New York in five or six shipments, with ten days or two weeks to intervene between each shipment.

Even if the prices and terms of credit had been agreed upon and understood, the vendor might well have declined to accept the order sent, upon the ground that the period for the delivery of the goods was extended beyond the limit set by them in giving price—viz., September 30th, or that their proposition, as to prices, related only to orders to be accompanied by immediate delivery, and payments to correspond with such time. Upon an offer of immediate sale at specified terms of credit, the buyer cannot extend the time of payment by postponing the time of delivery, without the vendor's consent.

But there is another objection to the alleged counter-claim.¹

¹ So much of the case as relates to this question should be considered in connection with the cases *infra*, pp. .—ED.

If the price-list, delivered to the defendants by the plaintiff, could be regarded as containing a definite proposition to sell, which was open to the defendants to accept, previous to September 30th, and thus complete the execution of a contract, it was still, until accepted, a mere proposition, which it was competent for the plaintiff to withdraw at pleasure. The defendant did not, at any time prior to September 30th, order goods from plaintiff upon the terms stated in the plaintiff's price-list. They claim that some time during the month of September one Clute, the agent of plaintiff, gave them other terms, and that they, therefore, had a right to order on the modified terms. Assume this to be so, and also that an unconditional order by the defendants of goods, according to the terms as modified by Clute, would make a valid contract, yet this would not render the order of the 27th good, for the reason that Clute's modification was practically withdrawn by the plaintiff before its acceptance by defendants. The plaintiff in the letter of September 25th assumes that, after Clute's modification, only two rates of discount were open to purchasers under the price-list, and that defendants must conform to one or the other in making purchases. In reply to this letter, defendants make the large order of September 27th, which is in dispute, and require that it shall be accepted upon the terms which they had previously understood Clute to offer.

Even if we assume that Clute did make the modification as claimed by defendants, yet they were informed on the 25th that neither Clute nor the plaintiff supposed that he had made any such modification, and the only terms upon which they were willing to make sales were restated to the defendants. Notwithstanding this information and the implied disavowal of the Clute terms, the defendants still insisted that the order of the 27th should be accepted and filled according to their understanding of the prior order. Certainly no irrevocable offer was made by plaintiff, and no contract can be predicated upon an offer which has been modified or withdrawn before an unconditional acceptance. If at the time an acceptance is made there is a dispute going on between the parties as to the terms of the offer, can it be said that the minds of the parties have met when the acceptance of the disputed offer is tendered? We think not.

We have thus concluded that no contract for the sale of the goods mentioned in the order of September 27th was made by the receipt by the plaintiff of defendants' letter of that date; and it is equally clear that none was made afterward.

Upon the 29th the plaintiff informed the defendants that it was beyond their power to accept that order, and they have

never varied from this position. They had the right to reject the order for the reason stated, whatever may have been the truth as to the controversy, relating to terms and prices ; and after September 30th, no offer remained open for the defendants' acceptance. The order of September 22d was made good by the delivery and acceptance of the goods, the plaintiff having severed the orders by distinct and repeated refusals to fill the one of the 27th.

The judgment should be affirmed.

All concur.

Judgment affirmed.

ARCHIE D. SANDERS ET AL., APPELLANTS, v. POTTLITZER BROS. FRUIT COMPANY, RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, DECEMBER 18, 1894.

[*Reported in 144 New York Reports 209.*]

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 23d, 1893, which affirmed a judgment in favor of defendant entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Eugene M. Bartlett for appellants.

George W. Daggett for respondent.

O'BRIEN, J. The plaintiffs in this action sought to recover damages for the breach of a contract for the sale and delivery of a quantity of apples. The complaint was dismissed by the referee and his judgment was affirmed upon appeal. The only question to be considered is whether the contract stated in the complaint, as the basis for damages, was ever in fact made so as to become binding upon the parties. On October 28th, 1891, the plaintiffs submitted to the defendant the following proposition in writing :

" BUFFALO, N. Y., October 28, 1891.

" MESSRS. POTTLITZER BROS. FRUIT CO., Lafayette, Ind.:

" GENTLEMEN : We offer you ten carloads of apples to be from 175 to 200 barrels per car, put up in good order, from stock inspected by your Mr. Leo Pottlitzer at Nunda and Silver Springs. The apples not to exceed one half green fruit, balance red fruit, to be shipped as follows :

" First car between December 1st and 15th, 1891.

" Second car between December 15th and 30th, 1891, and one car each ten days after January 1st, 1892, until all are shipped. Dates above specified to be considered as approximate a few days either way, at the price of \$2.00 per barrel, free on board cars at Silver Springs and Nunda, in refrigerator cars, this proposition to be accepted not later than the 31st inst., and you to pay us \$500 upon acceptance of the proposition, to be deducted from the purchase price of apples at the rate of \$100 per car on the last five cars.

" Yours respectfully,

" J. SANDERS & SON."

To this proposition the defendant replied by telegraph on October 31st as follows :

" LAFAYETTE, IND., October 31.

" J. SANDERS & SON :

" We accept your proposition on apples, provided you will change it to read car every eight days from January 1st, none in December ; wire acceptance.

" POTTLITZER BROS. FRUIT CO."

On the same day the plaintiffs replied to this despatch to the effect that they could not accept the modification proposed, but must insist upon the original offer. On the same day the defendant answered the plaintiffs' telegram as follows :

" Can only accept condition as stated in last message. Only way we can accept. Answer if accepted. Mail contract and we will then forward draft.

" POTTLITZER BROS. FRUIT CO."

The matter thus rested till November 4th, when the plaintiffs received the following letter from the defendant :

" LAFAYETTE, IND., November 2, 1891.

" J. SANDERS & SON, Stafford, N. Y.:

" GENTS : We are in receipt of your telegrams, also your favor of the 31st ult. While we no doubt think we have offered you a fair contract on apples, still the dictator of this has learned on his return home that there are so many near-by apples coming into market that it will affect the sale of apples in December, and, therefore, we do not think it advisable to take the contract unless you made it read for shipment from January 1st. We are very sorry you cannot do this, but perhaps we will be able to take some fruit from you, as we will need it in the spring.

If you can change the contract so as to read as we wired you we will accept it and forward you draft in payment on same.

“POTTLITZER FRUIT CO.”

On receipt of this letter the plaintiffs sent the following message to the defendant by telegraph :

“November 4.

“POTTLITZER BROS. FRUIT CO., Lafayette, Ind.:

“Letter received. Will accept conditions. If satisfactory, answer and will forward contract.

“J. SANDERS & SON.”

The defendant replied to this message by telegraph, saying : “All right, send contract as stated in our message.” The plaintiffs did prepare and send on the contract precisely in the terms embraced in the foregoing correspondence, which was the original proposition made by the plaintiffs, as modified by defendant’s telegram above set forth, and which was acceded to by the plaintiffs. This was not satisfactory to the defendant, and it returned it to the plaintiffs with certain modifications, which were not referred to in the correspondence. These modifications were : (1) That the fruit should be well protected from frost and well hayed ; (2) that if, in the judgment of the plaintiffs, it was necessary or prudent that the cars should be fired through, the plaintiffs should furnish the stoves for the purpose, and the defendant pay the expense of the man to be employed in looking after the fires to be kept in the cars ; (3) that the plaintiffs should line the cars in which the fruit was shipped. These conditions were more burdensome and rendered the contract less profitable to the plaintiffs. They were not expressed in the correspondence, and I think cannot be implied. They were not assented to by the plaintiffs, and on their declining to incorporate them in the paper the defendant treated the negotiations as at an end, and notified the plaintiffs that it had placed its order with other parties. There was some further correspondence, but it is not material to the question presented by the appeal. The writings and telegrams that passed between the parties contain all the elements of a complete contract. Nothing was wanting in the plaintiffs’ original proposition, but the defendant’s assent to it in order to constitute a contract binding upon both parties according to its terms. This assent was given upon condition that a certain specified modification was accepted. The plaintiffs finally assented to the modification and called upon the defendant to signify its assent again to the whole arrangement as thus modified, and it

replied that it was "all right," which must be taken as conclusive evidence that the minds of the parties had met and agreed upon certain specified and distinct obligations which were to be observed by both. It is true, as found by the learned referee, that the parties intended that the agreement should be formally expressed in a single paper which, when signed, should be the evidence of what had already been agreed upon. But neither party was entitled to insert in the paper any material condition not referred to in the correspondence, and if it was inserted without the consent of the other party it was unauthorized. Hence the defendant, by insisting upon further material conditions not expressed or implied in the correspondence, defeated the intention to reduce the agreement to the form of a single paper signed by both parties. The plaintiffs then had the right to fall back upon their written proposition as originally made and the subsequent letters and telegrams, and if they constituted a contract of themselves the absence of the formal agreement contemplated was not under the circumstances material. When the parties intend that a mere verbal agreement shall be finally reduced to writing as the evidence of the terms of the contract, it may be true that nothing is binding upon either party until the writing is executed.

But here the contract was already in writing, and it was none the less obligatory upon both parties because they intended that it should be put into another form, especially when their intention is made impossible by the act of one or the other of the parties by insisting upon the insertion of conditions and provisions not contemplated or embraced in the correspondence. (*Vassar v. Camp*, 11 N. Y. 441; *Brown v. Norton*, 50 Hun, 248; *Pratt v. H. R. R. Co.*, 21 N. Y. 308.) The principle that governs in such cases was clearly stated by Selden, J., in the case last cited in these words: "A contract to make and execute a certain written agreement, the terms of which are mutually understood and agreed upon, is, in all respects, as valid and obligatory, where no statutory objection interposes, as the written contract itself would be, if executed. If, therefore, it should appear that the minds of the parties had met; that a proposition for a contract had been made by one party and accepted by the other; that the terms of this contract were in all respects definitely understood and agreed upon, and that a part of the mutual understanding was, that a written contract, embodying these terms, should be drawn and executed by the respective parties, this is an obligatory contract, which another party is at liberty to refuse to perform."

In this case it is apparent that the minds of the parties met

through the correspondence upon all the terms as well as the subject-matter of the contract, and that the subsequent failure to reduce this contract to the precise form intended, for the reason stated, did not affect the obligations of either party, which had already attached, and they may now resort to the primary evidence of their mutual stipulations. Any other rule would always permit a party who has entered into a contract like this through letters and telegraphic messages to violate it whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions. If this were the rule the contract would never be completed in cases where by changes in the market or other events occurring subsequent to the written negotiations it became the interest of either party to adopt that course in order to escape or evade obligations incurred in the ordinary course of commercial business. A stipulation to reduce a valid written contract to some other form cannot be used for the purpose of imposing upon either party additional burdens or obligations or of evading the performance of those things which the parties have mutually agreed upon by such means as made the promise or assent binding in law. There was no proof of any custom existing between the shippers and consignees of such property in regard to the payment of the expense of firing, lining, and haying the cars. If it be said that such precautions are necessary in order to protect the property while in transit, that does not help the defendant. The question still remains, who was to bear the expense? The plaintiffs had not agreed to pay it any more than they had agreed to pay the freight or incur the other expenses of transportation. The plaintiffs sent a plain proposition which the defendant accepted without any such conditions as it subsequently sought to attach to it. That the parties intended to make and sign a final paper does not warrant the inference that they also intended to make another and different agreement. The defendant is in no better position than it would be in case it had refused to sign the final writing without alleging any reasons whatever. The principle, therefore, which is involved in the case is this, can parties who have exchanged letters and telegrams with a view to an agreement, and have arrived at a point where a clear and definite proposition is made on the one side and accepted on the other, with an understanding that the agreement shall be expressed in a formal writing, ever be bound until that writing is signed? If they are at liberty to repudiate the proposition or acceptance, as the case may be, at any time before the paper is signed, and as the market may go up or down, then this case is well de-

cided. But if at the close of the correspondence the plaintiffs became bound by their offer, and the defendant by its acceptance of that offer, whether the final writing was signed or not, as I think they did, under such circumstances as the record discloses, then the conclusion of the learned referee was erroneous. To allow either party to repudiate the obligations clearly expressed in the correspondence, unless the other will assent to material conditions, not before referred to, or to be implied from the transaction, would be introducing an element of great confusion and uncertainty into the law of contracts. If the parties did not become bound in this case, they cannot be bound in any case until the writing is executed.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except EARL, GRAY, and BARTLETT, JJ., dissenting.

Judgment reversed.

SIMPSON v. HUGHES.

IN THE COURT OF APPEAL, MARCH 9, 1897.

[*Reported in 66 Law Journal Reports, Chancery, New Series, 334.*]

THE facts are fully stated in the report of the case in the Court below. Shortly they were as follows :

The defendant was the owner of a certain freehold house and land called the "Wray estate." On November 7th, 1895, his agent wrote on his behalf to the plaintiff asking whether he was disposed to purchase this estate at the price of £2000. In answer to this the plaintiff wrote on November 8th, 1895, a letter, the material parts of which were as follows : "I . . . have decided to accept Mr. Hughes's offer, and will give you the £2000 he asks for the freehold of the Wray property.

"I should like to know from what time Mr. Hughes wishes the purchase to date. . . .

"You do not mention fences, but I should be obliged if they may be seen to at once, as they really need attention."

No reply was made to this letter.

The Wray estate was in the occupation in part of Mr. Simpson, and in part of Professor Armstrong, as tenants of Mr. Hughes. Both tenants have been for some time aware of Mr. Hughes's wish to sell, and had been negotiating as to a purchase, and in September, 1895, Mr. Hughes's agent had written to Professor Armstrong offering him the Wray estate upon

terms similar to those contained in the offer to Mr. Simpson. Professor Armstrong wrote accepting this offer on November 12th, 1895.

Both Mr. Simpson and Professor Armstrong brought actions against Hughes for specific performance of their contracts. Professor Armstrong was made a defendant to Mr. Simpson's action, and the two actions came on together for hearing.

ROMER, J., held that the letters of November 7th and 8th, 1895, made a binding contract between Simpson and Hughes, and he gave judgment in favor of Simpson in his action, and dismissed Armstrong's action.¹

Armstrong appealed.

Neville, Q.C., and *Leigh Clare* for the appeal.

Eve, Q.C., and *H. Fellows* for Simpson.

LINDLEY, L.J. This case comes before us in a somewhat curious way. The question is whether two persons have entered into a contract. They both say that they have, but a third party says that they have not. It is the more curious because the third party has already had a decision against him, to the effect that he has got no contract. If that is so, I do not see that he has got any *locus standi*. If that had been brought to our attention when the appeal was opened, we might have allowed this appeal to stand over, in case there should be an appeal in the other action, but as we have considered the matter we will dispose of it now.

The only question is whether there was a binding contract between the plaintiff and defendant Hughes made by the two letters of November 7th and 8th, 1895. (His Lordship referred to the facts, and continued.) The first question is whether the letter of November 7th, 1895, was an offer for acceptance at all, or anything more than an offer by way of opening negotiations. There can be no difficulty as to that when one reads the correspondence. It was a definite offer, not an invitation to negotiate, but the last stage of the negotiation so far as the vendor was concerned. The plaintiff in answer says that he has decided to accept the offer, and will give the price asked for the property. Up to that point there is a clear and distinct offer and acceptance. Then the letter continues: "I should like to know from what time Mr. Hughes wishes the purchase to date." It is said that that leaves the matter open, but I do not think so. There is no time fixed for completion, but that is not uncommon on the sale of real estate, and if no time is fixed, the inference is that the completion will be within a reasonable time. Does the inquiry in the letter exclude the inference

¹ Appeal from a decision of Romer, J (reported *ante*, p. 143).

which there would otherwise be as to the time? Counsel for the appellant say that it does, but no time was really fixed—the matter was left just as it was, with no time fixed by either party. The inquiry was made simply as a matter of courtesy. If a reasonable time had been fixed, Simpson could not have got off his bargain, because I think that he was bound by his letter to complete within a reasonable time. It was a complete contract, and must be read as if the paragraph were not there.

Then there is the paragraph about the fences. That, I think, is not a condition of the purchase. I understand that the letter was written in answer to another letter, and it does not justify the construction sought to be put upon it. I think there is nothing in this letter which detracts from the acceptance contained in the first part of it. Armstrong had had an offer of the property, and he wants us to say that there had been no bargain between Hughes and Simpson. I think that he is wrong, and that the appeal must be dismissed with costs.

SMITH, L.J. I am of the same opinion. (His Lordship referred to the correspondence and continued.) The letter of November 8th contains a clear acceptance of a clear offer to purchase the property for £2000. If it had stopped there, the completion would have been within a reasonable time, the law would import that it should be within a reasonable time, but having bound himself hard and fast, Simpson goes on to ask as to the date of the purchase. The paragraph in which he does so is no part of the contract at all. Simpson did not thereby bind himself to any time, or to any term which Hughes might see fit to impose. The time for completion was fixed by law. I agree, therefore, with Romer, J., in the view that he took of it.

Then as to the last part of the letter, as to the fences. This point was not taken before Romer, J., but it has been taken here, and we must deal with it. It is said that that is a material term of the bargain, but I cannot read it like that. It was not part of the bargain, which was to buy the property for £2000, nor was it a condition precedent to the bargain being carried out. For these reasons I think that there was a binding contract between Simpson and Hughes, and on that I rest my judgment.

I would add that this is a remarkable case. The two parties say that they did make a bargain, but another person comes and says that they did not, but I will say nothing further as to that.

RIGBY, L.J. I am of the same opinion, but I have not come to that conclusion without some difficulty. I have no difficulty in treating the letter of November 7th as an offer, and the only

question is whether there has been a complete acceptance of that offer.

If I thought that the matters contained in the paragraphs of the letter of November 8th that have been referred to were intended to form part of the contract, I should have great difficulty in coming to the conclusion that there was a complete contract. These things run very close, and I do not go so far as to say that if the words here were read, "I must know at what time Mr. Hughes will complete," I should treat that as not being part of the express terms of the contract. That is to say, reading it, "I will give the price subject to this, that we must arrange between ourselves a date for completion." If that were so, I should be inclined to say that there was no complete contract. That would not be within the principle, that when no date is fixed for completion it must be within a reasonable time. I cannot understand that the question whether these two letters contained a valid contract for the sale and purchase of the land within the Statute of Frauds can be affected by the ideas that either party entertained as to it. Interpreting the language according to the facts known at the time is a totally different thing from saying what they thought. But I agree with the conclusion arrived at by Romer, J., and the other members of this Court on this ground, that I do not think that the words in question are part of any contract. There is an offer and acceptance, and the question is, do these words qualify the acceptance, or are they independent? In my opinion, they leave it a complete acceptance, because I rely on the form of it, which is, in effect, this: "I should like to know when you will be ready to complete"—that is, what is the day within a reasonable time which you will fix?

With regard to the last clause, as to the fences. It is obvious that one would not have expected them to have been mentioned unless something had been said about them before. There must have been something, but what it was I do not know. It is remarkable that in the Court below no mention was made of this part of the case, therefore no opportunity was given to either Simpson or Hughes of explaining about it. I do not consider that paragraph as part of the bargain. The only part of the letter which contains a contract is the first part, which is clear. The appeal must be dismissed with costs.

(g) *Termination of offer by revocation.*¹

PAYNE v. CAVE.

IN THE KING'S BENCH, MAY 2, 1789.

[Reported in 3 Term Reports 148.]

THIS was an action, tried at the Sittings after last Term at Guildhall before Lord Kenyon, wherein the declaration stated, that the plaintiff, on September 22d, 1788, was possessed of a certain worm-tub, and a pewter worm in the same, which were then and there about to be sold by public auction by one S. M., the agent of the plaintiff in that behalf ; the conditions of which sale were to be the usual conditions of sale of goods sold by auction, etc., of all which premises the defendant afterward, to wit, etc., had notice ; and thereupon the defendant in consideration that the plaintiff, at the special instance and request of the defendant, did then and there undertake and promise to perform the conditions of the said sale, to be performed by the plaintiff, as seller, etc., undertook, and then and there promised the plaintiff to perform the conditions of the sale, to be performed on the part of the buyer, etc. And the plaintiff avers, that the conditions of sale, hereinafter mentioned, are usual conditions of sale of goods sold by auction, to wit, that the highest bidder should be the purchaser, and should deposit five shillings in the pound, and that if the lot purchased were not paid for and taken away in two days' time, it should be put up again and

¹ Death or insanity may prevent the completion of the contract as effectually as the most complete revocation, but they are not properly revocations of the offer. They are not acts of the will of the offerer, and their effect does not rest upon a supposed change of purpose. They interrupt the completion of the contract—that is, the making of the contract—because a contract cannot be made directly with a dead man or a lunatic. The contract is not made until the offer is accepted ; and if the person with whom you merely intend to contract dies or becomes insane before you have contracted with him, you can no longer contract decidedly with him. You cannot, by adhibiting your acceptance to an offer, and addressing it to a dead man or a lunatic, make it binding for him, whether his death or insanity be or be not known to you. In such a case there is no revocation, in the correct use of the word, but there is an interruption—an effective obstacle to the completion of the contract, equivalent in result to a revocation, though operating by very different facts and very different principles. Revocation or recall is an act of the offerer by which he communicates his change of purpose and withdraws from the offeree the right he had given him to complete the contract by acceptance.—The Lord President, Thomson v. James, 18 Dunlop, 1, 10.—ED.

resold, etc. [stating all the conditions]. It then stated that the defendant became the purchaser of the lot in question for £40, and was requested to pay the usual deposit, which he refused, etc. At the trial, the plaintiff's counsel opened the case thus : The goods were put up in one lot at an auction ; there were several bidders, of whom the defendant was the last who bid £40 ; the auctioneer dwelt on the bidding, on which the defendant said, " Why do you dwell ? you will not get more." The auctioneer said that he was informed the worm weighed at least 1300 cwt., and was worth more than £40 ; the defendant then asked him whether he would warrant it to weigh so much, and received an answer in the negative, he then declared that he would not take it, and refused to pay for it. It was re-sold on a subsequent day's sale for £30 to the defendant, against whom the action was brought for the difference. Lord Kenyon, being of opinion, on this statement of the case, that the defendant was at liberty to withdraw his bidding any time before the hammer was knocked down, nonsuited the plaintiff.

Walton now moved to set aside the nonsuit, on the ground that the bidder was bound by the conditions of the sale to abide by his bidding, and could not retract. By the act of bidding, he acceded to those conditions, one of which was, that the highest bidder should be the buyer. The hammer is suspended, not for the benefit of the bidder, or to give him an opportunity of repenting, but for the benefit of the seller ; in the mean time the person who bid last is a conditional purchaser, if nobody bids more. Otherwise, it is in the power of any person to injure the vendor, because all the former biddings are discharged by the last ; and, as it happened in this very instance, the goods may thereby ultimately be sold for less than the person who was last outbid would have given for them. The case of *Simon v. Metivier*,¹ which was mentioned at the trial, does not apply. That turned on the Statute of Frauds.

The Court thought the nonsuit very proper. The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding ; that is signified on the part of the seller, by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called *locus pœnitentiæ*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed.

Rule refused.

¹ 5 Burr, 1921.

HEAD v. DIGGON.

IN THE KING'S BENCH, MICHAELMAS TERM, 1828.

[Reported in 3 Manning & Ryland 97.]

ASSUMPSIT. The declaration stated, that plaintiff bargained for, and bought from defendant, certain large quantities of wool, to wit, at and for a certain rate or price, to wit, at or for the rate or price of £9 10s. for each and every pack thereof, and thereupon, in consideration of the premises, and that plaintiff had undertaken to accept and pay for said wool at and for, etc., defendant undertook that he would, within a reasonable time, deliver said wool. Averment, that a reasonable time had elapsed, and that plaintiff had always been ready and willing to receive and pay; whereof defendant had notice. Yet defendant did not deliver within such reasonable time, or at any time. Whereby plaintiff lost great gains and profits. Second count, stating the consideration to be, that plaintiff *would buy*, receive, and pay, and alleging a promise to sell and deliver, and a readiness to buy, accept, and pay. Third count, laying the promise to deliver on request. At the trial before Holroyd, J., at the last assizes for the county of Suffolk, the following facts appeared: The plaintiff is a wool-factor in Bury St. Edmund's, the defendant is a fellmonger at Thetford. On Thursday, April 17th, 1828, the plaintiff went to the defendant's house at Thetford to treat for the purchase of wool. After some discussion about the price, the plaintiff requested of the defendant time to consider of his terms. The defendant said he would give him a week. The plaintiff replied that three or four days would be enough. The defendant then wrote the following paper:

" THETFORD, April 17, 1828.

" Offered Mr. Head, of Bury, the under wool, with three days' grace from the above date :

40 Sussex head and lamb, }	} £9 10s.
40 Head ditto,	
17 Broad head,	

As per sample—delivered in good condition.

" FRA^s. DIGGON."

On the following Monday the plaintiff went to the defendant to accept the wool, and to make arrangements for the delivery. The defendant said, that as the plaintiff had not seen him or

written him on Sunday, he had given a price to one Fyson. The plaintiff said that Sunday was not a day of business. The defendant persisted in refusing to deliver the wool. Upon this evidence the learned judge was of opinion that the plaintiff had failed in proving a contract binding on both parties, and on the authority of *Cooke v. Oxley*¹ directed a nonsuit, which

Storks now moved to set aside. It is true, that up to a certain period one party was at liberty ; but in *Adams v. Lindsell*,² the defendant offered to sell certain goods to the plaintiff, receiving an answer by return of post. The letter being misdirected, the answer, signifying the acceptance of the offer, arrived two days later than it ought to have done. The defendant had on the preceding day sold the goods to a third person. The Court held that this was a binding contract, and that an action lay for non-delivery of the goods. *Cooke v. Oxley*, upon which the other side relies, was cited in *Adams v. Lindsell*, and may be considered as overruled by the latter decision. [Lord Tenterden, C.J. Must both parties be bound, or is it sufficient if one only is bound? You contend that the buyer was to be free during the three days, and that the seller was to be bound. The declaration treats it as a complete contract, an absolute and unconditional bargain. Those counts are not proved. Whether a declaration could be framed to meet the facts, we are not called upon to decide.] The declaration applies to the contract at the period when, by the plaintiff's acceptance, it became complete.

LORD TENTERDEN, C.J. If the contract is to be taken as made only at the time when the plaintiff signified his acceptance of the offer, it is disproved by the circumstance that the defendant did not then agree.

BAYLEY, J. I am of the same opinion ; and in *Routledge v. Grant*³ it was held by the Court of Common Pleas that unless both parties are bound, neither is bound.

Rule refused.

¹ 3 T. R. 653.

² 1 Barn. & Ald. 681.

³ 4 Bingh. 653 ; 1 Moore & Payne, 717, S.C.

ROUTLEDGE v. GRANT.

IN THE COMMON PLEAS, MAY 13, 1828.

[Reported in 4 Bingham 653.]

ASSUMPSIT. The declaration stated (first count) that the plaintiff was possessed of a term in a dwelling-house, to expire December 25th, 1856 ; and that defendant agreed, on April 29th, 1825, upon receiving a lease for twenty-one years, at £250 a year rent, with the option of having the time extended to thirty-one years, on giving six months' notice, and, upon having possession on July 25th then next, to pay plaintiff £2750, and take the fixtures at a valuation.

Averment of plaintiff's readiness to grant the lease. Breach ; refusal to accept it, and to take the fixtures at a valuation ; and non-payment of the £2750.

The second count alleged the plaintiff to be entitled to a certain term, to wit, a term of thirty-two years, in the dwelling-house, under a certain contract between the plaintiff and Anthony Hermon, who was authorized in that behalf ; and then stated the agreement with the defendant, and the breach, as before.

The third count alleged plaintiff to be possessed for the residue of a certain term, to expire December 25th, 1856 ; and the agreement, tender of lease to defendant, and breach, as before.

At the trial before Best, C.J., London sittings after Michaelmas Term, it appeared, that on March 18th, 1825, the plaintiff received a note from the defendant touching the premises in these terms :

“ MR. GRANT'S PROPOSAL.

“ To pay a premium of £2750, upon receiving a lease for twenty-one years, with the option (upon giving six months' previous notice to the landlord or his agent) of having the time extended to thirty-one years, paying the same yearly rent as before, for such extended term of ten years beyond twenty-one years.

Rent, £250.

“ Mr. Grant to pay for the fixtures at a valuation, possession to be given on or before July 25th next, to which time all taxes and outgoings are to be discharged by Mr. Routledge ; and a definitive answer to be given within six weeks from March 18th, 1825.”

The plaintiff, who at this time had only a term of twelve years in the premises, had to apply to his landlord for a new lease, before he was in a condition to accept the defendant's offer. The plaintiff having come to an understanding with his landlord, wrote the following note to the defendant :

" Mr. Routledge begs to say that he accepts Mr. Grant's offer for his house, No. 59 St. James's Street, and that he will give Mr. Grant possession on August 1st next.

" ST. JAMES'S STREET, April 6th, 1825.

" Mr. R. will esteem it a particular favor if Mr. Grant will not, for the present, name the subject to any one."

The defendant returned the following answer :

" April 7, 1825.

" SIR : I received your note last night, and hasten to acquaint you, that having considered as confidential the negotiation respecting your house, I had mentioned it to no one ; but upon consulting with a friend this morning, in whose opinion I have more confidence than my own, I am advised, for some reasons which had not occurred to myself, not to think of taking a house in St. James's Street for a dwelling-house. May I therefore request you to permit me to withdraw the proposal I made to you about it ? I am in hopes you will make no hesitation to do this, when you consider the spirit of candor and openness in which it was made to you. But should it be otherwise, as I am the last that would willingly act with inconsistency, I will willingly refer the question to friends for decision, and abide by their opinion of the case.

" I have the honor to be, etc.,

" ALEX. GRANT.

" MR. THOMAS ROUTLEDGE."

To this the plaintiff replied as follows :

" April 8, 1825.

" SIR : In answer to your letter of yesterday, I beg to state that, relying upon your performing the agreement for the purchase of my house in St. James's Street, I have taken another house, and made arrangements which I cannot without great loss relinquish. I hope, therefore, that you will not wish me to withdraw it.

" I am, etc.,

" THOS. ROUTLEDGE.

" ALEXANDER GRANT, Esquire."

The defendant rejoined :

" April 9, 1825.

" SIR : Your note of yesterday surprised me, being altogether at variance with your conversation with me two or three hours previous to your note, dated on the evening of 6th, in which, you must recollect, you one moment declared yourself off ; and finally you went away to have the opinion of Mrs. Routledge about the answer you were to send me. How, therefore, you can, under such circumstances, suffer loss and inconvenience from my declining to proceed further in the treaty, I am at a loss to imagine ; and I was in hopes you would have been satisfied with what I had stated in reply to your first note, to have had the liberality of letting the matter drop. But if that should not be your intention, I have only to add, that you may proceed with your claim for ' loss and inconvenience ' as you may think most advisable.

" I am, etc.,

" ALEX. GRANT.

" MR. THOMAS ROUTLEDGE."

The plaintiff after this surrendered the existing lease to his landlord, and obtained from him a new one, dated April 21st, 1825, from December 25th, 1824, for thirty-two years, for the same clear yearly rent of £250, payable quarterly ; in which the covenants on the part of the lessee were similar to those in the former ; and then wrote the defendant the following letter :

" SIR : Upon referring to my letter to you of the 6th instant, accepting your offer for my house, No. 59 St. James's Street, I perceive that I, by mistake, stated that I would give possession on August 1st next. By your offer, you state that possession is to be given on or before July 25th next ; and I inform you that I am ready to give you possession, according to your proposal.

" I am, etc.,

" THOS. ROUTLEDGE.

" April 29th, 1825."

This letter, on the day it was dated, was delivered at the defendant's house ; and the keys, and a lease of the premises in question, according to the agreement, were tendered to him before July 25th, but rejected.

The six weeks, from March 18th, 1825, within which, by the defendant's proposal, a definitive answer was to be given, expired on May 1st, 1825.

Upon these facts it was objected, first, that the plaintiff being allowed six weeks to accept or reject the defendant's offer, the defendant was entitled, also, until it was accepted, to retract it,

at any period before the expiration of the six weeks ; that there was no acceptance of the terms proposed, till April 29th, which came too late, the defendant having retracted his proposal on the 9th. Secondly, that the plaintiff had not, before the defendant withdrew his proposal, any such interest in the premises as he was alleged to have in the declaration, or as would have enabled him to accede to that proposal. The plaintiff was thereupon nonsuited, with leave to move the Court to set the nonsuit aside.

Taddy accordingly obtained a rule *nisi* to set aside this nonsuit, and

Wilde showed cause.

Taddy and *Jones* in support of the rule.

BEST, C.J. The nonsuit was right on both grounds. I put it on the same footing as I did at *nisi prius*. Here is a proposal by the defendant to take property on certain terms—namely, that he should be let into possession in July. In that proposal he gives the plaintiff six weeks to consider ; but if six weeks are given on one side to accept an offer, the other has six weeks to put an end to it. One party cannot be bound without the other. This was expressly decided in *Cooke v. Oxley*,¹ where the defendant proposed to sell at a certain price, tobacco to the plaintiff, who desired to have till four in the afternoon of that

¹ *Cooke v. Oxley* was decided in 1790, and is reported as follows in 3 T. R. 653 :

This was an action upon the case ; and the third count in the declaration, upon which the verdict was taken, stated that on, etc., a certain discourse was had, etc., concerning the buying of 266 hogsheads of tobacco ; and on that discourse the defendant proposed to the plaintiff that the former should sell and deliver to the latter the said 266 hogsheads [at a certain price] ; whereupon the plaintiff desired the defendant to give him (the plaintiff) time to agree to or dissent from the proposal till the hour of four in the afternoon of that day, to which the defendant agreed ; and thereupon the defendant proposed to the plaintiff to sell and deliver the same upon the terms aforesaid, *if the plaintiff would agree to purchase them upon the terms aforesaid, and would give notice thereof to the defendant before the hour of four in the afternoon of that day* ; the plaintiff averred that he did agree to purchase the same upon the terms aforesaid, and did give notice thereof to the defendant before the hour of four in the afternoon of that day ; he also averred that he requested the defendant *to deliver* to him the said hogsheads, and offered to pay to the defendant the said price for the same, yet that the defendant did not, etc.

A rule having been obtained to show cause why the judgment should not be arrested, on the ground that there was no consideration for the defendant's promise.

Erskine and *Wood* now showed cause. This was a bargain and sale on condition ; and though the plaintiff might have rescinded the contract before 4 o'clock, yet not having done so, the condition was complied with, and both parties were bound by the agreement. The declaration consid-

day to agree to or dissent from the proposal ; with which terms the defendant complied ; and the plaintiff having afterward sued him for non-delivery of the tobacco, Lord Kenyon put it on the true ground, by saying, " At the time of entering into this contract the engagement was all one side ; the other party was not bound." Buller, J., said : " It has been argued that this must be taken to be a complete sale from the time the condition was complied with ; but it was not complied with, for it is not stated that the defendant did agree *at 4 o'clock* to the terms of the sale, or even that the goods were kept till that time." I put the present case on the same ground. At the time of entering into this contract the engagement was all on one side. In *Payne v. Cave*,¹ it was holden that the defendant, who had bid at an auction, might retract his bidding any time before the hammer was down, and the Court said : " The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding ; that is signified on the part of the seller by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called *locus penitentiae*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But, according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed."

These cases have established the principle on which I decide—namely, that, till both parties are agreed, either has a right to be off. The case of *Adams v. Lindsell* is supposed to break
ered this as a complete bargain and sale ; for the breach of the agreement is for not *delivering* the tobacco, and not for not selling it.

LORD KENYON, C.J. (stopping *Bearcroft*, who was to have argued in support of the rule). Nothing can be clearer than that at the time of entering into this contract the engagement was all on one side ; the other party was not bound ; it was therefore *nudum pactum*.

BULLER, J. It is impossible to support this declaration in any point of view. In order to sustain a promise, there must be either a damage to the plaintiff, or an advantage to the defendant ; but here was neither when the contract was first made. Then as to the subsequent time, the promise can only be supported on the ground of a new contract made at 4 o'clock ; but there is no pretence for that. It has been argued that this must be taken to be a complete sale from the time when the condition was complied with ; but it was not complied with, for it is not stated that the defendant did agree at 4 o'clock to the terms of the sale ; or even that the goods were kept till that time.

GROSE, J. The agreement was not binding on the plaintiff before 4 o'clock ; and it is not stated that the parties came to any subsequent agreement ; there is therefore no consideration for the promise.

Rule absolute.—ED.

¹ 3 T. R. 148.

in on them ; but I think it does not, because the Court put it on the circumstance that the offer was made by the post, and say : " If the defendants were not bound by their offer when accepted by the plaintiffs, till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making during every instant of the time their letter was travelling the same identical offer to the plaintiffs ; and then the contract is completed by the acceptance of it by the latter." If they are to be considered as making the offer till it is accepted, the other may say, " make no further offer, because I shall not accept it ;" and to place them on an equal footing, the party who offers should have the power of retracting as well as the other of rejecting ; therefore I cannot bring myself to admit that a man is bound when he says, " I will sell you goods upon certain terms, receiving your answer in course of post." However, it is not necessary to touch that decision, for the reasoning of the Court coincides with the principle on which we now determine. As the defendant repudiated the contract on April 9th, before the expiration of the six weeks, he had a right to say that the plaintiff should not enforce it afterward.

But upon the question of variance, we are all of opinion that none of the counts apply. It is not necessary, perhaps, that the *termini* of the plaintiff's lease should be set out with precision ; but the variance is fatal, if the plaintiff has not, at least, an interest which will enable him to perform his contract. The variance is not in words, but in substance. The plaintiff had no such term as that stated in the first and third counts. In the second, he states he had a contract for a lease ; such a contract, to be valid, must be in writing, and he cannot be said to have had it unless he had it in writing. But there was no evidence of any such contract ; and, therefore, upon both grounds, the rule must be discharged.

BURROUGH, J.,¹ coincided in discharging the rule on the ground of variance.

GASELEE, J. If this case had rested on the first point, I should have wished for time to consider it, but on the ground of variance I have no doubt that this rule must be discharged.

¹ Park, J., was absent at chambers.

THE BOSTON & MAINE RAILROAD *v.* BARTLETT
AND ANOTHER.IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH
TERM, 1849.[*Reported in 3 Cushing 224.*]

THIS was a bill in equity for the specific performance of a contract in writing.

The plaintiffs alleged that the defendants on April 1st, 1844, being the owners of certain land situated in Boston, and particularly described in the bill, "in consideration that said corporation would take into consideration the expediency of buying said land for their use as a corporation, signed a certain writing, dated April 1st, 1844," whereby they agreed to convey to the plaintiffs "the said lot of land, for the sum of \$20,000, if the said corporation would take the same within thirty days from that date;" that afterward and within the thirty days, the defendants, at the request of the plaintiffs, "and in consideration that the said corporation agreed to keep in consideration the expediency of taking said land," etc., extended the said term of thirty days, by a writing underneath the written contract above mentioned, for thirty days from the expiration thereof; that, on May 29th, 1844, while the extended contract was in full force, and unrescinded, the plaintiffs elected to take the land on the terms specified in the contract, and notified the defendants of their election, and offered to pay them the agreed price (producing the same in money) for a conveyance of the land, and requested the defendants to execute a conveyance thereof, which the plaintiffs tendered to them for that purpose; and that the defendants refused to execute such conveyance, or to perform the contract, and had ever since neglected and refused to perform the same.

The defendants demurred generally.

J. P. Healy for the defendants.

G. Minot (with whom was *R. Choate*) for the plaintiffs.

FLETCHER, J.¹ In support of the demurrer, in this case, the only ground assumed and insisted on by the defendants is, that the agreement on their part was without consideration, and therefore not obligatory. In the view taken of the case by the Court, no importance is attached to the consideration set out in the bill—namely, "that the plaintiffs would take into con-

¹ Wilde, J., did not sit in this case.

sideration the expediency of buying the land." The argument for the defendants, that their agreement was not binding, because without consideration, erroneously assumes that the writing executed by the defendants is to be considered as constituting a contract at the time it was made. The decision of the Court in Maine in the case of *Bean v. Burbank*, 4 Shepl. 458, which was referred to for the defendants, seems to rest on the ground assumed by them in this case.

In the present case, though the writing signed by the defendants was but an offer, and an offer which might be revoked, yet while it remained in force and unrevoked, it was a continuing offer during the time limited for acceptance; and, during the whole of that time, it was an offer every instant, but as soon as it was accepted, it ceased to be an offer merely, and then ripened into a contract. The counsel for the defendants is most surely in the right, in saying that the writing when made was without consideration, and did not therefore form a contract. It was then but an offer to contract, and the parties making the offer most undoubtedly might have withdrawn it at any time before acceptance.

But when the offer was accepted, the minds of the parties met, and the contract was complete. There was then the meeting of the minds of the parties, which constitutes and is the definition of a contract. The acceptance by the plaintiffs constituted a sufficient legal consideration for the engagement on the part of the defendants. There was then nothing wanting, in order to perfect a valid contract on the part of the defendants. It was precisely as if the parties had met at the time of the acceptance, and the offer had then been made and accepted and the bargain completed at once.

A different doctrine, however, prevails in France and Scotland and Holland. It is there held that whenever an offer is made, granting to a party a certain time within which he is to be entitled to decide, whether he will accept it or not, the party making such offer is not at liberty to withdraw it before the lapse of the appointed time. There are certainly very strong reasons in support of this doctrine. Highly respectable authors regard it as inconsistent with the plain principles of equity, that a person, who has been induced to rely on such an engagement, should have no remedy in case of disappointment. But whether wisely and equitably or not, the common law unyieldingly insists upon a consideration, or a paper with a seal attached.

The authorities, both English and American, in support of this view of the subject, are very numerous and decisive; but

it is not deemed to be needful or expedient to refer particularly to them, as they are collected and commented on in several reports as well as in the text-books. The case of *Cooke v. Oxley*, 3 T. R. 653, in which a different doctrine was held, has occasioned considerable discussion, and in one or two instances has probably influenced the decision. That case has been supposed to be inaccurately reported, and that in fact there was in that case no acceptance. But however that may be, if the case has not been directly overruled, it has certainly in later cases been entirely disregarded, and cannot now be considered as of any authority.

As therefore in the present case the bill sets out a proposal in writing, and an acceptance and an offer to perform, on the part of the plaintiffs, within the time limited, and while the offer was in full force, all which is admitted by the demurrer, so that a valid contract in writing is shown to exist, the demurrer must be overruled.

OFFORD v. DAVIES AND ANOTHER.

IN THE COMMON PLEAS, JUNE 2, 1862.

[*Reported in 12 Common Bench, New Series, 748.*]

THIS was an action upon a guarantee.

The first count of the declaration stated that, by a certain instrument in writing signed by the defendants, and addressed and delivered by the defendants to the plaintiff, the defendants undertook, promised, and agreed with the plaintiff in the words and figures following—that is to say : “ We, the undersigned, in consideration of your discounting, at our request, bills of exchange for Messrs. Davies & Co., of Newtown, Montgomeryshire, drapers, hereby jointly and severally guaranty *for the space of twelve calendar months* the due payment of all such bills of exchange, to the extent of £600. And we further jointly and severally undertake to make good any loss or expenses you may sustain or incur in consequence of advancing Messrs. Davies & Co. such moneys.” Averment, that the plaintiff, relying on the said promise of the defendants, after the making of the said promise, and within the space of twelve calendar months thereafter, did discount divers bills of exchange for the said Messrs. Davies & Co., of Newtown aforesaid, certain of which bills of exchange became due and payable before the commencement of this suit, but were not then or at any other time duly paid, and the said bills respectively were dishon-

ored ; and that the plaintiff, after the making of the said promise, and within the said twelve calendar months, advanced to the said Messrs. Davies & Co. divers sums of money on and in respect of the discount of the said last-mentioned bills so dishonored as aforesaid, certain of which moneys were due and owing to the plaintiff before and at the time of the commencement of this suit ; and that all things had happened and all times had elapsed necessary, etc. ; yet that the defendants broke their said promise, and did not pay to the plaintiff or to the respective holders for the time being of the said bills of exchange so dishonored as aforesaid, or to any other person entitled to receive the same, the respective sums of money payable by the said bills of exchange ; nor did the defendants pay to the plaintiff the said sums of money so advanced by the plaintiff as aforesaid, or any part thereof ; whereby the sums payable by the said bills of exchange so dishonored as aforesaid became lost to the plaintiff, and he became liable to pay and take up certain of the said bills of exchange, and did pay and take up certain of the said bills of exchange, and was forced and obliged to and did expend certain moneys in endeavoring to obtain part of certain of the said bills of exchange, and the plaintiff lost the interest which he might have made of his moneys if the said bills had been duly paid at maturity.

Fourth plea to the first count—so far as the same relates to the sums payable by the defendants in respect of the sums of money payable by the said bills of exchange and the said sums so advanced—that, after the making of the said guarantee, and before the plaintiff had discounted such bills of exchange, and before he had advanced such sums of money, the defendants countermanded the said guarantee, and requested the plaintiff not to discount such bills of exchange, and not to advance such moneys.

To this plea the plaintiff demurred, the ground of demurrer stated in the margin being, “ that the fourth plea offers no defence to that part of the declaration to which it is pleaded, for that a party giving a guarantee [for a definite period] has no power to countermand it without the assent of the person to whom it is given.” Joinder.

Prentice (with whom was *Brandt*), in support of the demurrer.

E. James, Q.C. (with whom was *T. Jones*) *contra*.

ERLE, C.J., now delivered the judgment of the Court.¹

The declaration alleged a contract by the defendants, in consideration that the plaintiff would at the request of the defend-

¹ The case was argued before Erle, C.J., Williams, J., Willes, J., and Byles, J.

ants discount bills for Davies & Co., not exceeding £600, the defendants promised to guaranty the repayment of such discounts *for twelve months*, and the discount, and no repayment. The plea was, a revocation of the promise before the discount in question; and the demurrer raises the question whether the defendants had a right to revoke the promise. We are of opinion that they had, and that consequently the plea is good.

This promise by itself creates no obligation. It is in effect, conditioned to be binding if the plaintiff acts upon it, either to the benefit of the defendants, or to the detriment of himself. But, until the condition has been at least in part fulfilled, the defendants have the power of revoking it. In the case of a simple guarantee for a proposed loan, the right of revocation before the proposal has been acted on did not appear to be disputed. Then, are the rights of the parties affected either by the promise being expressed to be for twelve months, or by the fact that some discounts had been made before that now in question, and repaid? We think not.

The promise to repay for twelve months creates no additional liability on the guarantor, but, on the contrary, fixes a limit in time beyond which his liability cannot extend. And, with respect to other discounts, which had been repaid, we consider each discount as a separate transaction, creating a liability on the defendant till it is repaid, and, after repayment, leaving the promise to have the same operation that it had before any discount was made, and no more.

Judgment for the defendants.

SHUEY, EXECUTOR, v. UNITED STATES.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1875.

[*Reported in 92 United States Reports 73.*]

APPEAL from the Court of Claims.

Henry B. Ste. Marie filed his petition in the Court of Claims to recover the sum of \$15,000, being the balance alleged to be due him of the reward of \$25,000 offered by the Secretary of War, on April 20th, 1865, for the apprehension of John H. Surratt, one of Booth's alleged accomplices in the murder of President Lincoln.

The Court below found the facts as follows :

1. On April 20th, 1865, the Secretary of War issued, and

caused to be published in the public newspapers and otherwise, a proclamation, whereby he announced that there would be paid by the War Department "for the apprehension of John H. Surratt, one of Booth's accomplices," \$25,000 reward, and also that "liberal rewards will be paid for any information that shall conduce to the arrest of either of the above-named criminals or their accomplices;" and such proclamation was not limited in terms to any specific period, and it was signed "Edwin M. Stanton, Secretary of War." On November 24th, 1865, the President caused to be published his order revoking the reward offered for the arrest of John H. Surratt. 13 Stat. 778.

2. In April, 1866, John H. Surratt was a zouave in the military service of the Papal Government, and the claimant was also a zouave in the same service. During that month he communicated to Mr. King, the American Minister at Rome, the fact that he had discovered and identified Surratt, who had confessed to him his participation in the plot against the life of President Lincoln. The claimant also subsequently communicated further information to the same effect, and kept watch, at the request of the American Minister, over Surratt. Thereupon certain diplomatic correspondence passed between the Government of the United States and the Papal Government relative to the arrest and extradition of Surratt; and on November 6th, 1866, the Papal Government, at the request of the United States, ordered the arrest of Surratt, and that he be brought to Rome, he then being at Veroli. Under this order of the Papal Government, Surratt was arrested; but, at the moment of leaving prison at Veroli, he escaped from the guard having him in custody, and, crossing the frontier of the Papal territory, embarked at Naples, and escaped to Alexandria in Egypt. Immediately after his escape, and both before and after his embarkation at Naples, the American Minister at Rome, being informed of the escape by the Papal Government, took measures to trace and rearrest him, which was done in Alexandria. From that place he was subsequently conveyed by the American Government to the United States; but the American Minister, having previously procured the discharge of the claimant from the Papal military service, sent him forward to Alexandria to identify Surratt. At the time of the first interview between the claimant and the American Minister, and at all subsequent times until the final capture of Surratt, they were ignorant of the fact that the reward offered by the Secretary of War for his arrest had been revoked by the President. The discovery and arrest of Surratt were due entirely to the disclosures made by the claimant to the American Minister at

Rome ; but the arrest was not made by the claimant, either at Veroli, or subsequently at Alexandria.

3. There has been paid to the claimant by the defendants, under the Act of July 27th, 1868 (15 Stat. 234, § 3), the sum of \$10,000. Such payment was made by a draft on the Treasury payable to the order of the claimant, which draft was by him duly indorsed.

The Court found as a matter of law that the claimant's service, as set forth in the foregoing findings, did not constitute an arrest of Surratt within the meaning of the proclamation, but was merely the giving of information which conduced to the arrest. For such information the remuneration allowed to him under the Act of Congress was a full satisfaction, and discharges the defendants from all liability.

The petition was dismissed accordingly, whereupon an appeal was taken to this Court.

Ste. Marie having died *pendente lite*, his executor was substituted in his stead.

D. B. Meany and F. Carroll Brewster for the appellant.

Assistant Attorney-General Edwin B. Smith, contra.

STRONG, J., delivered the opinion of the Court.

We agree with the Court of Claims, that the service rendered by the plaintiff's testator was, not the apprehension of John H. Surratt, for which the War Department had offered a reward of \$25,000, but giving information that conduced to the arrest. These are quite distinct things, though one may have been a consequence of the other. The proclamation of the Secretary of War treated them as different ; and, while a reward of \$25,000 was offered for the apprehension, the offer for information was only a "liberal reward." The findings of the Court of Claims also exhibit a clear distinction between making the arrest and giving the information that led to it. It is found as a fact, that the arrest was not made by the claimant, though the discovery and arrest were due entirely to the disclosures made by him. The plain meaning of this is, that Surratt's apprehension was a consequence of the disclosures made. But the consequence of a man's act are not his acts. Between the consequence and the disclosure that leads to it there may be, and in this case there were, intermediate agencies. Other persons than the claimant made the arrest—persons who were not his agents, and who themselves were entitled to the proffered reward for his arrest, if any persons were. We think, therefore, that at most the claimant was entitled to the "liberal reward" promised for information conducing to the arrest ; and that reward he has received.

But, if this were not so, the judgment given by the Court of Claims is correct.

The offer of a reward for the apprehension of Surratt was revoked on November 24th, 1865 ; and notice of the revocation was published. It is not to be doubted that the offer was revocable at any time before it was accepted, and before anything had been done in reliance upon it. There was no contract until its terms were complied with. Like any other offer of a contract, it might, therefore, be withdrawn before rights had accrued under it ; and it was withdrawn through the same channel in which it was made. The same notoriety was given to the revocation that was given to the offer ; and the findings of fact do not show that any information was given by the claimant, or that he did anything to entitle him to the reward offered, until five months after the offer had been withdrawn. True, it is found that then, and at all times until the arrest was actually made, he was ignorant of the withdrawal ; but that is an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published proclamation, he should have known that it could be revoked in the manner in which it was made.

Judgment affirmed.

DICKINSON v. DODDS.

IN THE COURT OF APPEAL, APRIL 1, 1876.

[*Reported in Law Reports, 2 Chancery Division 463.*]

ON Wednesday, June 10th, 1874, the defendant, John Dodds, signed and delivered to the plaintiff, George Dickinson, a memorandum, of which the material part was as follows :

" I hereby agree to sell to Mr. George Dickinson the whole of the dwelling-houses, garden ground, stabling, and outbuildings thereto belonging, situate at Croft, belonging to me, for the sum of £800. As witness my hand this tenth day of June, 1874.

" £800. (Signed) JOHN DODDS."

" P.S.—This offer to be left over until Friday, 9 o'clock A.M. J. D. (the twelfth), 12th June, 1874.

(Signed) " J. DODDS."

The bill alleged that Dodds understood and intended that the plaintiff should have until Friday 9 A.M. within which to determine whether he would or would not purchase, and that

he should absolutely have until that time the refusal of the property at the price of £800, and that the plaintiff, in fact, determined to accept the offer on the morning of Thursday, June 11th, but did not at once signify his acceptance to Dodds, believing that he had the power to accept it until 9 A.M. on the Friday.

In the afternoon of the Thursday the plaintiff was informed by a Mr. Berry that Dodds had been offering or agreeing to sell the property to Thomas Allan, the other defendant. Thereupon the plaintiff, at about half-past seven in the evening, went to the house of Mrs. Burgess, the mother-in-law of Dodds, where he was then staying, and left with her a formal acceptance in writing of the offer to sell the property. According to the evidence of Mrs. Burgess, this document never in fact reached Dodds, she having forgotten to give it to him.

On the following (Friday) morning, at about seven o'clock, Berry, who was acting as agent for Dickinson, found Dodds at the Darlington railway station, and handed to him a duplicate of the acceptance by Dickinson, and explained to Dodds its purport. He replied that it was too late, as he had sold the property. A few minutes later Dickinson himself found Dodds entering a railway carriage, and handed him another duplicate of the notice of acceptance, but Dodds declined to receive it, saying, "You are too late. I have sold the property."

It appeared that on the day before, Thursday, June 11th, Dodds had signed a formal contract for the sale of the property to the defendant Allan for £800, and had received from him a deposit of £40.

The bill in this suit prayed that the defendant Dodds might be decreed specifically to perform the contract of June 10th, 1874; that he might be restrained from conveying the property to Allan; that Allan might be restrained from taking any such conveyance; that, if any such conveyance had been or should be made, Allan might be declared a trustee of the property for, and might be directed to convey the property to, the plaintiff; and for damages.

The cause came on for hearing before Vice-Chancellor Bacon on January 25th, 1876.

Kay, Q.C., and *Caldecott* for the plaintiff.

Swanston, Q.C., and *Crossley* for the defendant Dodds.

Jackson, Q.C., and *Gazdar* for the defendant Allan.

BACON, V.C., after remarking that the case involved no question of unfairness or inequality, and after stating the terms of the document of June 10th, 1874, and the statement of the defendant's case as given in his answer, continued :

I consider that to be one agreement, and I think the terms of the agreement put an end to any question of *nudum pactum*. I think the inducement for the plaintiff to enter into the contract was the defendant's compliance with the plaintiff's request that there should be some time allowed to him to determine whether he would accept it or not. But whether the letter is read with or without the postscript, it is, in my judgment, as plain and clear a contract for sale as can be expressed in words, one of the terms of that contract being that the plaintiff shall not be called upon to accept, or to testify his acceptance until 9 o'clock on the morning of June 12th. I see, therefore, no reason why the Court should not enforce the specific performance of the contract, if it finds that all the conditions have been complied with.

Then what are the facts? It is clear that a plain, explicit acceptance of the contract was, on Thursday, June 11th, delivered by the plaintiff at the place of abode of the defendant, and ought to have come to his hands. Whether it came to his hands or not, the fact remains that, within the time limited, the plaintiff did accept and testify his acceptance. From that moment the plaintiff was bound, and the defendant could at any time, notwithstanding Allan, have filed a bill against the plaintiff for the specific performance of the contract which he had entered into, and which the defendant had accepted.

I am at a loss to guess upon what ground it can be said that it is not a contract which the Court will enforce. It cannot be on the ground that the defendant had entered into a contract with Allan, because, giving to the defendant all the latitude which can be desired, admitting that he had the same time to change his mind as he, by the agreement, gave to the plaintiff—the law, I take it, is clear on the authorities, that if a contract, unilateral in its shape, is completed by the acceptance of the party on the other side, it becomes a perfectly valid and binding contract. It may be withdrawn from by one of the parties in the mean time, but, in order to be withdrawn from, information of that fact must be conveyed to the mind of the person who is to be affected by it. It will not do for the defendant to say, "I made up my mind that I would withdraw, but I did not tell the plaintiff; I did not say anything to the plaintiff until after he had told me by a written notice and with a loud voice that he accepted the option which had been left to him by the agreement." In my opinion, after that hour on Friday, earlier than 9 o'clock, when the plaintiff and defendant met, if not before, the contract was completed, and neither party could retire from it.

It is said that the authorities justify the defendant's contention that he is not bound to perform this agreement, and the case of *Cooke v. Oxley*¹ was referred to. But I find that the judgment in *Cooke v. Oxley* went solely upon the pleadings. It was a rule to show cause why judgment should not be arrested, therefore it must have been upon the pleadings. Now, the pleadings were that the vendor in that case proposed to sell to the defendant. There was no suggestion of any agreement which could be enforced. The defendant proposed to the plaintiff to sell and deliver, if the plaintiff would agree to purchase upon the terms offered, and give notice at an earlier hour than four of the afternoon of that day; and the plaintiff says he agreed to purchase, but does not say the defendant agreed to sell. He agreed to purchase, and gave notice before 4 o'clock in the afternoon. Although the case is not so clearly and satisfactorily reported as might be desired, it is only necessary to read the judgment to see that it proceeds solely upon this allegation in the pleadings. Buller, J., says: "As to the subsequent time, the promise can only be supported upon the ground of a new contract made at 4 o'clock; but there was no pretence for that." Nor was there the slightest allegation in the pleadings for that; and judgment was given against the plaintiff.

*Routledge v. Grant*² is plainly distinguishable from this case upon the grounds which have been mentioned. There the contract was to sell on certain terms; possession to be given upon a particular day. Those terms were varied, and therefore no agreement was come to; and when the intended purchaser was willing to relinquish the condition which he imposed, the other said, "No, I withdraw; I have made up my mind not to sell to you;" and the judgment of the Court was that he was perfectly right.

Then *Warner v. Willington*³ seems to point out the law in the clearest and most distinct manner possible. An offer was made—call it an agreement or offer, it is quite indifferent. It was so far an offer, that it was not to be binding unless there was an acceptance, and before acceptance was made, the offer was retracted, the agreement was rescinded, and the person who had then the character of vendor declined to go further with the arrangement, which had been begun by what had passed between them. In the present case I read the agreement as a positive engagement on the part of the defendant Dodds that he will sell for £800, and, not a promise, but an agreement, part of the same instrument, that the plaintiff shall not be called upon to express his acquiescence in that agreement until Friday

¹ 3 T. R. 653.

² 4 Bing. 653.

³ 3 Drew. 523.

at 9 o'clock. Before Friday at 9 o'clock the defendant receives notice of acceptance. Upon what ground can the defendant now be let off his contract? It is said that Allan can sustain his agreement with the defendant, because at the time when they entered into the contract the defendant was possessed of the property, and the plaintiff had nothing to do with it. But it would be opening the door to fraud of the most flagrant description if it was permitted to a defendant, the owner of property, to enter into a binding contract to sell, and then sell it to somebody else and say that by the fact of such second sale he has deprived himself of the property which he has agreed to sell by the first contract. That is what Allan says in substance, for he says that the sale to him was a retraction which deprived Dodds of the equitable interest he had in the property, although the legal estate remained in him. But by the fact of the agreement, and by the relation back of the acceptance (for such I must hold to be the law) to the date of the agreement, the property in equity was the property of the plaintiff, and Dodds had nothing to sell to Allan. The property remained intact, unaffected by any contract with Allan, and there is no ground, in my opinion, for the contention that the contract with Allan can be supported. It would be doing violence to principles perfectly well known and often acted upon in this Court. I think the plaintiff has made out very satisfactorily his title to a decree for specific performance, both as having the equitable interest, which he asserts is vested in him, and as being a purchaser of the property for valuable consideration without notice against both Dodds, the vendor, and Allan, who has entered into the contract with him.

There will be a decree for specific performance, with a declaration that Allan has no interest in the property; and the plaintiff will be at liberty to deduct his costs of the suit out of his purchase-money.

From this decision both the defendants appealed, and the appeals were heard on March 31st and April 1st, 1876.

Swanston, Q.C. (*Crossley* with him), for the defendant Dodds.

H. Jackson, Q.C. (*Gazdar* with him), for the defendant Allan.

Kay, Q.C., and *Caldecott* for the plaintiff.

JAMES, L.J., after referring to the document of June 10th, 1874, continued:

The document, though beginning "I hereby agree to sell," was nothing but an offer, and was only intended to be an offer, for the plaintiff himself tells us that he required time to consider whether he would enter into an agreement or not. Unless both parties had then agreed there was no concluded agreement

then made ; it was in effect and substance only an offer to sell. The plaintiff, being minded not to complete the bargain at that time, added this memorandum—"This offer to be left over until Friday, 9 o'clock A.M., June 12th, 1874." That shows it was only an offer. There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property unsold until 9 o'clock on Friday morning ; but apparently Dickinson was of opinion, and probably Dodds was of the same opinion, that he (Dodds) was bound by that promise, and could not in any way withdraw from it, or retract it, until 9 o'clock on Friday morning, and this probably explains a good deal of what afterward took place. But it is clear settled law, on one of the clearest principles of law, that this promise, being a mere *nudum pactum*, was not binding, and that at any moment before a complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself. Well, that being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, "Now I withdraw my offer." It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retraction. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time—that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed ; but in this case, beyond all question, the plaintiff knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, "I withdraw the offer." This is evident from the plaintiff's own statements in the bill.

The plaintiff says in effect that, having heard and knowing that Dodds was no longer minded to sell to him, and that he was selling or had sold to some one else, thinking that he could not in point of law withdraw his offer, meaning to fix him to it, and endeavoring to bind him, "I went to the house where he was lodging, and saw his mother-in-law, and left with her an acceptance of the offer, knowing all the while that he had entirely changed his mind. I got an agent to watch for him at 7 o'clock the next morning, and I went to the train just before 9 o'clock, in order that I might catch him and give him my notice of acceptance just before 9 o'clock, and when that

occurred he told my agent, and he told me, you are too late, and he then threw back the paper." It is to my mind quite clear that before there was any attempt at acceptance by the plaintiff, he was perfectly well aware that Dodds had changed his mind, and that he had, in fact, agreed to sell the property to Allan. It is impossible, therefore, to say there was ever that existence of the same mind between the two parties which is essential in point of law to the making of an agreement. I am of opinion, therefore, that the plaintiff has failed to prove that there was any binding contract between Dodds and himself.

MELLISH, L.J. I am of the same opinion. The first question is, whether this document of June 10th, 1874, which was signed by Dodds, was an agreement to sell, or only an offer to sell, the property therein mentioned to Dickinson; and I am clearly of opinion that it was only an offer, although it is in the first part of it, independently of the postscript, worded as an agreement. I apprehend that, until acceptance, so that both parties are bound, even though an instrument is so worded as to express that both parties agree, it is in point of law only an offer, and, until both parties are bound, neither party is bound. It is not necessary that both parties should be bound within the Statute of Frauds, for, if one party makes an offer in writing, and the other accepts it verbally, that will be sufficient to bind the person who has signed the written document. But, if there be no agreement, either verbally or in writing, then, until acceptance, it is in point of law an offer only, although worded as if it were an agreement. But it is hardly necessary to resort to that doctrine in the present case, because the postscript calls it an offer, and says, "this offer to be left over until Friday, 9 o'clock A.M." Well, then, this being only an offer, the law says—and it is a perfectly clear rule of law—that, although it is said that the offer is to be left open until Friday morning at 9 o'clock, that did not bind Dodds. He was not in point of law bound to hold the offer over until 9 o'clock on Friday morning. He was not so bound either in law or in equity. Well, that being so, when on the next day he made an agreement with Allan to sell the property to him, I am not aware of any ground on which it can be said that that contract with Allan was not as good and binding a contract as ever was made. Assuming Allan to have known (there is some dispute about it, and Allan does not admit that he knew of it, but I will assume that he did) that Dodds had made the offer to Dickinson, and had given him till Friday morning at 9 o'clock to accept it, still in point of law that could not prevent Allan from making a more favorable offer than Dickinson, and entering at once into a binding agreement with Dodds.

Then Dickinson is informed by Berry that the property has been sold by Dodds to Allan. Berry does not tell us from whom he heard it, but he says that he did hear it, that he knew it, and that he informed Dickinson of it. Now, stopping there, the question which arises is this—If an offer has been made for the sale of property, and before that offer is accepted, the person who has made the offer enters into a binding agreement to sell the property to somebody else, and the person to whom the offer was first made receives notice in some way that the property has been sold to another person, can he after that make a binding contract by the acceptance of the offer? I am of opinion that he cannot. The law may be right or wrong in saying that a person who has given to another a certain time within which to accept an offer is not bound by his promise to give that time; but, if he is not bound by that promise, and may still sell the property to some one else, and if it be the law that, in order to make a contract, the two minds must be in agreement at some one time—that is, at the time of the acceptance—how is it possible that when the person to whom the offer has been made knows that the person who has made the offer has sold the property to some one else, and that, in fact, he has not remained in the same mind to sell it to him, he can be at liberty to accept the offer and thereby make a binding contract? It seems to me that would be simply absurd. If a man makes an offer to sell a particular horse in his stable, and says, "I will give you until the day after to-morrow to accept the offer," and the next day goes and sells the horse to somebody else, and receives the purchase-money from him, can the person to whom the offer was originally made then come and say, "I accept," so as to make a binding contract, and so as to be entitled to recover damages for the non-delivery of the horse? If the rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependent on the acceptance of the person to whom it is made, is a mere *nudum pactum*, how is it possible that the person to whom the offer has been made can by acceptance make a binding contract after he knows that the person who has made the offer has sold the property to some one else? It is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is dead, and parting with the property has very much the same effect as the death of the owner, for it makes the performance of the offer impossible. I am clearly of opinion that, just as when a man who has made an offer dies before it is accepted it is impossible that it can then be accepted, so when once the person to whom the offer was made knows that the property has been sold to

some one else, it is too late for him to accept the offer, and on that ground I am clearly of opinion that there was no binding contract for the sale of this property by Dodds to Dickinson, and even if there had been, it seems to me that the sale of the property to Allan was first in point of time. However, it is not necessary to consider, if there had been two binding contracts, which of them would be entitled to priority in equity, because there is no binding contract between Dodds and Dickinson.

BAGGALLAY, J.A. I entirely concur in the judgments which have been pronounced.

JAMES, L.J. The bill will be dismissed with costs.

Swanston, Q.C. We shall have the costs of the appeal.

Kay, Q.C. There should only be the costs of one appeal.

H. Jackson, Q.C. The defendant Allan was obliged to protect himself.

MELLISH, L.J. He had a separate case. There might, if two contracts had been proved, have been a question of priority.

JAMES, L.J. I think the plaintiff must pay the costs of both appeals.

BYRNE & CO. v. LEON VAN TIENHOVEN & CO.

IN THE HIGH COURT OF JUSTICE, COMMON PLEAS DIVISION,
MARCH 6, 1880.

[*Reported in Law Reports, 5 Common Pleas Division 344.*]

ACTION tried at Cardiff assizes, before Lindley, J., without a jury.

B. T. Williams and *B. Francis Williams* for the plaintiffs.

M'Intyre, Q.C., and *Hughes* for the defendants.

Cur. adv. vult.

LINDLEY, J. This was an action for the recovery of damages for the non-delivery by the defendants to the plaintiffs of 1000 boxes of tinplates, pursuant to an alleged contract, which I will refer to presently. The action was tried at Cardiff before myself without a jury; and it was agreed at the trial that in the event of the plaintiffs being entitled to damages they should be £375.

The defendants carried on business at Cardiff and the plaintiffs at New York, and it takes ten or eleven days for a letter posted at either place to reach the other. The alleged contract consists of a letter written by the defendants to the plaintiffs on October 1st, 1879, and received by them on the 11th, and accepted by telegram and letter sent to the defendants on October 11th and 15th respectively. These letters and telegram

were as follows : [The learned judge read the letter of October 1st, 1879, from the defendants to the plaintiffs. It contained a reference to the price of tinplates branded "Hensol," and the "offer of 1000 boxes of this brand 14 X 20 at 15s. 6d. per box f. o. b. here with 1 per cent for our commission ; terms, four months' bankers' acceptance on London or Liverpool against shipping documents, but subject to your cable on or before the 15th inst. here." The answer was a telegram from the plaintiffs to the defendants sent on October 11th, 1879 : "Accept thousand Hensols." On October 15th, 1879, the plaintiffs wrote to the defendants : "We have to thank you for your valued letter under date 1st inst., which we had on Saturday P.M., and immediately cabled acceptance of the 1000 boxes 'Hensol,' 1c. 14/20 as offered. Against this transaction we have pleasure in handing you herewith the Canadian Bank of Commerce letter of credit No. 78, October 13th, on Messrs. A. R. McMaster & Brothers, London, for £1000. . . . Will thank you to ship the 1000 'Hensols' without delay." These letters and telegram would, if they stood alone, plainly constitute a contract binding on both parties. The defendants in their pleadings say that there was no sufficient writing within the Statute of Frauds, and that they contracted only as agents ; but these contentions were very properly abandoned as untenable, and do not require further notice. The defendants, however, raise two other defences to the action which remain to be considered. First, they say that the offer made by their letter of October 1st was revoked by them before it had been accepted by the plaintiffs by their telegram of the 11th or letter of the 15th.¹ The facts as to these are as follows : On October 8th the defendants wrote and sent by post to the plaintiffs a letter withdrawing their offer of the 1st. The material part of this letter was as follows : "Confirming our respects of the 1st inst. we hasten to inform you that there having been a regular panic in the tinplate market during the last few days, which has caused prices to run up about 25 per cent, we are reluctantly compelled to withdraw any offer we have made to our constituents, and must therefore also consider our offer to you for 1000 boxes 'Hensols' at 17s. 6d. to be cancelled from this date." This letter of October 8th reached the plaintiffs on October 20th. On the same day the plaintiffs telegraphed to the defendants demanding shipment, and sent them a letter insisting on completion of the contract. [The learned judge read the letter. In it the plaintiffs expressed astonishment at the contents of the letter of the 8th, recapitulated the transactions, and said "practically and

¹ Only so much of the opinion is given as relates to this question.—ED.

in fact a contract for 1000 boxes came into existence between you and ourselves. It requires the consent of both parties to a contract to cancel same. If instead of writing to us on the 8th you had cabled 'offer withdrawn,' you would have protected yourselves and us too. We disposed of the 1000 boxes on the 17th at a net profit of \$1850. . . . We write our friend Philip S. Philips, Esq., of Aberkllery, requesting him to call on you and demand delivery as agreed." In a postscript they added, "You speak of offer of 1000 boxes Hensol at 17s. 6d. The only firm offer we received from you under date of October 1st was 1000 boxes at 15s. 6d., and 10 per cent f. o. b. Cardiff; we cable you to-night 'demand shipment.'" This letter is followed by one from the defendants to the plaintiffs of October 25th refusing to complete. [The learned judge read it. The defendants acknowledged the receipt of the cable message of the 20th, enclosed the credit note sent in the letter of the 15th, and added, "Our offer having been withdrawn by our letter of the 8th inst., we now return the above credit, for which we have no further need, but take this opportunity to observe that in case of any future business proposals between us, we must request you to conform to our rules and principles, which require bankers' credit in this country, whereas the firm of A. R. McMaster & Brothers are not classified as such."]

There is no doubt that an offer can be withdrawn before it is accepted, and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not—*Routledge v. Grant*.¹ For the decision of the present case, however, it is necessary to consider two other questions—viz.: 1. Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent? 2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent?

It is curious that neither of these questions appears to have been actually decided in this country. As regards the first question, I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not, in fact, any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind not notified cannot be regarded in dealings between man and man; and that an uncommunicated revocation is for all practical purposes and in point of law no

¹ 4 Bing. 653.

revocation at all. This is the view taken in the United States. See *Taylor v. Merchants' Fire Insurance Co.*¹ cited in Benjamin on Sales, pp. 56-58, and it is adopted by Mr. Benjamin. The same view is taken by Mr. Pollock in his excellent work on *Principles of Contract*, 2d ed., p. 10, and by Mr. Leake in his *Digest of the Law of Contracts*, p. 43. This view, moreover, appears to me much more in accordance with the general principles of English law than the view maintained by Pothier. I pass, therefore, to the next question—viz., whether posting the letter of revocation was a sufficient communication of it to the plaintiff. The offer was posted on October 1st, the withdrawal was posted on the 8th, and did not reach the plaintiff until after he had posted his letter of the 11th, accepting the offer. It may be taken as now settled that where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted (*Harris's Case*,² *Dunlop v. Higgins*³) even although it never reaches its destination. When, however, these authorities are looked at, it will be seen that they are based upon the principle that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself, or, in other words, he has made the post-office his agent to receive the acceptance and notification of it. But this principle appears to me to be inapplicable to the case of the withdrawal of an offer. In this particular case I can find no evidence of any authority in fact given by the plaintiffs to the defendants to notify a withdrawal of their offer by merely posting a letter; and there is no legal principle or decision which compels me to hold, contrary to the fact, that the letter of October 8th is to be treated as communicated to the plaintiff on that day or on any day before the 20th, when the letter reached them. But before that letter had reached the plaintiffs they had accepted the offer, both by telegram and by post; and they had themselves resold the tin-plates at a profit. In my opinion the withdrawal by the defendants on October 8th of their offer of the 1st was inoperative; and a complete contract binding on both parties was entered into on October 11th, when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose had been withdrawn. Before leaving this part of the case it may be as well to point out the extreme injustice and inconvenience which any other conclusion would produce. If the defendants' contention were to prevail, no person who had received an offer by post and had accepted it would know his position until he had waited such a time as to

¹ 9 How. Sup. Ct. Rep. 390.² Law Rep. 7 Ch. 587.³ 1 H. L. 381.

be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. It appears to me that both legal principles and practical convenience require that a person who has accepted an offer not known to him to have been revoked shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties.

Judgment for plaintiffs.

CHARLES M. COLEMAN v. RUFUS W. APPLGARTH
AND PATRICK BRADLEY.

IN THE COURT OF APPEALS OF MARYLAND, OCTOBER TERM,
1887.

[*Reported in 68 Maryland Reports 21.*]

APPEAL from the Circuit Court of Baltimore City.

The case is stated in the opinion of the Court.

The cause was argued before Alvey, C.J., Stone, Miller, Robinson, and Bryan, J.

Richard Bernard for the appellant.

Sebastian Brown and *Rufus W. Applegarth* for the appellees.

ALVEY, C.J., delivered the opinion of the Court.

Coleman, the appellant, filed his bill against Applegarth and Bradley, the appellees, for a specific performance of what is alleged to be a contract made by Applegarth with Coleman for the sale of a lot of ground in the city of Baltimore. The contract, upon which the application is made, and which is sought to be specifically enforced, reads thus: "For and in consideration of the sum of \$5 paid me, I do hereby give to Charles Coleman the *option* of purchasing my lot of ground, northwest corner, etc., assigned to me by Wright and McDermot, by deed, dated, etc., subject to the ground rent therein mentioned, at and for the sum of \$645 cash, *at any time on or before the first day of November, 1886.*" It was dated September 3d, 1886, and signed by Applegarth alone.

The plaintiff, Coleman, did not exercise his option to purchase within the time specified in the contract; but he alleges in his bill that Applegarth, after making the contract of September 3d, 1886, and before the expiration of the time limited for the exercise of the option, verbally agreed with the plaintiff to extend the time for the exercise of such option to December 1st, 1886. It is further alleged that, about November 9th,

1886, without notice to the plaintiff, Applegarth sold, and assigned by deed, the lot of ground to Bradley, for the consideration of \$700; and that, subsequently, but prior to December 1st, 1886, the plaintiff tendered to Applegarth, in lawful money, the sum of \$645, and demanded a deed of assignment of the lot of ground, but which was refused. It is also charged that Bradley had notice of the optional right of the plaintiff at the time of taking the deed of assignment from Applegarth, and that such deed was made in fraud of the rights of the plaintiff under the contract of September 3d, 1886. The relief prayed is, that the deed to Bradley may be declared void, and that Applegarth may be decreed to convey the lot of ground to the plaintiff, upon payment by the latter of \$645; and for general relief.

The defendants, both Applegarth and Bradley, by their answer, deny that there was any binding contract, or optional right, existing, in regard to the sale of the lot, as between Applegarth and the plaintiff, at the time of the sale and transfer of the lot to Bradley; and the latter denies all notice of the alleged agreement for the extension of time for the exercise of the option by the plaintiff; and both defendants rely upon the Statute of Frauds as a defence to the relief prayed.

The plaintiff was examined as a witness in his own behalf, and he also called and examined both of the defendants as witnesses in support of the allegation of his bill. But, without special reference to the proof taken, the questions that are decisive of the case may be determined upon the facts as alleged by the bill alone, in connection with the contract exhibited, as upon demurrer; such facts being considered in reference to the grounds of defence interposed by the defendants.

The contract set up is not one of sale and purchase, but simply for the option to purchase within a specified time, and for a given price. It was unilateral and binding upon one party only. There was no mutuality in it, and it was binding upon Applegarth only for the time stipulated for the exercise of the option. After the lapse of the time given, there was nothing to bind him to accept the price and convey the property; and the fact that this unilateral agreement was reduced to writing added nothing to give it force or operative effect beyond the time therein limited for the exercise of the option by the plaintiff. It is quite true, as contended by the plaintiff, that, as a general proposition, time is not deemed by courts of equity as being of the essence of contracts; and that, in perfected contracts, ordinarily, the fact that the time for performance has past will not be regarded as a reason for withholding specific

execution. But while this is the general rule upon the subject, that general rule has well-defined exceptions, which are as constantly recognized as the general rule itself. If the parties have, as in this case, expressly treated time as of the essence of the agreement, or if it necessarily follows from the nature and circumstances of the agreement that it should be so regarded, courts of equity will not lend their aid to enforce specifically the agreement, regardless of the limitation of time. 2 Sto. Eq. Juris., § 776. Here time was of the very essence of the agreement, the nominal consideration being paid to the owner for holding the property for the specified time, subject to the right of the plaintiff to exercise his option whether he would buy it or not. When the time limited expired, the contract was at an end, and the right of option gone, if that right has not been extended by some valid binding agreement, that can be enforced. This would seem to be the plain dictate of reason, upon the terms and nature of the contract itself; and that is the plain result of the decision of this Court, made in respect to an optional contract to purchase, in the case of Maughlin v. Perry & Warren, 35 Md. 352, 359, 360.

As must be observed, it is not alleged or pretended that the plaintiff attempted to exercise his option, and to complete a contract of purchase, within the time limited by the written agreement of September 3d, 1886. But it is alleged and shown that before the expiration of such time, the defendant, Applegarth, verbally agreed or promised to extend the time for the exercise of the option by the plaintiff, from November 1st to December 1st, 1886; and that it was within this latter or extended period, and after the property had been sold and conveyed to Bradley, that the plaintiff proffered himself ready to accept the property and pay the price therefor. It is quite clear, however, that such offer to accept the property came too late. There was no consideration for the verbal promise or agreement to extend the time, and such promise was a mere *nudum pactum*, and therefore not enforceable, to say nothing of the Statute of Frauds, which has been invoked by the defendants. After November 1st, 1886, the verbal agreement of Applegarth operated simply as a mere continuing offer at the price previously fixed, and which offer only continued until it should be withdrawn or otherwise ended by some act of his; but he was entirely at liberty at any time, before acceptance, to withdraw the offer; and the subsequent sale and transfer of the property to Bradley had the effect at once of terminating the offer to the plaintiff. Pom. Spec. Perf. of Contrs., §§ 60-61.

The principles that govern in cases like the present are very

fully and clearly stated by the English Court of Appeal in Chancery, in the case of *Dickinson v. Dodds*, 2 Ch. Div. 463. That case, in several of its features, is not unlike the present. There the owner of property signed a document which purported to be an agreement to sell it at a fixed price, but added a postscript, which he also signed, in these words : " This offer to be left over until Friday, 9 o'clock A.M."—two days from the date of the agreement. Upon application of the party, who claimed to be vendee of the property, for specific performance, it was held, upon full and careful consideration by the Court of Appeal, that the document amounted only to an offer, which might be withdrawn at any time before acceptance, and that a sale to a third person which came to the knowledge of the person to whom the offer was made was an effectual withdrawal of the offer. In the course of his judgment, after declaring the written document to be nothing more than an offer to sell at a fixed price, James, L. J., said : " There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property unsold until 9 o'clock on Friday morning ; but apparently Dickinson was of opinion, and probably Dodds was of the same opinion, that he (Dodds) was bound by that promise, and could not in any way withdraw from it, or retract it, until 9 o'clock on Friday morning, and this probably explains a good deal of what afterward took place. But it is clear settled law, on one of the clearest principles of law, that this promise, being a mere *nudum pactum*, was not binding, and that at any moment before a complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself. That being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, ' Now I withdraw my offer.' It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retractation. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time—that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing." And Mellish, L. J., was quite as explicit in stating his judgment, in the course of which he said : " He was not in point of law bound to hold the offer over until 9 o'clock on Friday morning. He was not so bound either in law or in equity. Well, that being so, when on the next day he made an agreement with Allan to sell the property to him, I am not aware of any ground on which it can be said that that contract with Allan was not as

good and binding a contract as ever was made. Assuming Allan to have known (there is some dispute about it, and Allan does not admit that he knew of it, but I will assume that he did) that Dodds had made the offer to Dickinson, and had given him till Friday morning at 9 o'clock to accept it, still, in point of law, that could not prevent Allan from making a more favorable offer than Dickinson, and entering at once into a binding agreement with Dodds." And further on he says: "If the rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependent on the acceptance of the person to whom it is made, is a mere *nudum pactum*, how is it possible that the person to whom the offer has been made can by acceptance make a binding contract after he knows that the person who has made the offer has sold the property to some one else? It is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is dead, and parting with the property has very much the same effect as the death of the owner, for it makes the performance of the offer impossible. I am clearly of opinion that, just as when a man who has made an offer dies before it is accepted it is impossible that it can then be accepted, so when once the person to whom the offer was made knows that the property has been sold to some one else, it is too late for him to accept the offer; and on that ground I am clearly of opinion that there was no binding contract for the sale of this property by Dodds to Dickinson."

In this case, the plaintiff admits that, at the time he proffered to Applegarth acceptance of the previous offer to sell at the price named, he was aware of the fact that the property had been sold to Bradley. It was therefore too late for him to attempt to accept the offer, and there was not, and could not be made, by such proffered acceptance, any binding contract of sale of the property.

It follows that the decree of the Court below, dismissing the bill of the plaintiff, must be affirmed.

Decree affirmed.

WILLIAM W. BRAUER AND ANOTHER v. FRANK SHAW
AND OTHERS.

SAME v. SAME.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS,
MARCH 29, 1897.

[Reported in 168 Massachusetts Reports 198.]

Two actions of contract for the alleged breach of two contracts. The cases were tried together in the Superior Court, before Lilley, J., who ruled, as requested by the defendants, that the plaintiffs were not entitled to recover in either action, and directed the jury to return a verdict for the defendants in each case; and the plaintiffs alleged exceptions. The facts appear in the opinion.

H. M. Rogers for the plaintiffs.

B. L. M. Tower (*F. A. North* with him) for the defendants.

HOLMES, J. These are two actions of contract, on alleged contracts letting all the cattle carrying space on the Warren line of steamships for the May sailings from Boston to Liverpool, the first contract at the rate of 50s. a head, the second and alternative one at 52s. and 6d. As we are all of opinion that, for one reason or another, the right to recover upon the first contract is not made out, it may be stated shortly. On April 15th, 1892, after earlier correspondence, the defendants wrote stating terms, saying that they had telegraphed that they "would probably accept 50s. if reply promptly," referring to an answer asking to have the space kept until noon the next day, and to their reply that they would "try to keep space for you," and adding that there were several customers, and that they should feel "duty bound to let it to the first man making the best bid." The plaintiffs' agents telegraphed at fifty-three minutes past eight the next morning, making a modified offer. Whether they had received the above letter does not appear. The defendants answered, "referring our letter yesterday first offer for number named has preference three parties considering. Wire quick if you want it." This was received in the New York telegraph office at fifteen minutes past ten. At twenty minutes past ten the plaintiffs' agents telegraphed, "Have closed all your May spaces as per letter," etc. This is relied on as making the contract. It does not appear whether the telegram which arrived only five minutes before had been received. If not, and if the last telegram was in answer to the

letter only, the plaintiffs would encounter the question whether the letter contained an absolute offer or only invited one, and if the former, whether the offer had not been rejected by the modified offer in the first telegram mentioned. However this may be, the parties did not stop at the point which we have reached, but went on telegraphing as we shall state, so that if there was any moment when a contract had been made the parties assumed the contrary and continued their bargaining. Either no contract had been made thus far, or it was discharged by the conduct of the parties. It was treated as discharged in a letter of the plaintiffs' agents written later on the same day.

We come, then, to the later telegrams of the same day, which are relied on as making the second contract. At half-past eleven the defendants telegraphed, "Subject prompt reply will let you May space fifty-two six." This was received in New York at sixteen minutes past twelve, and at twenty-eight minutes past twelve a reply was sent accepting the offer. For some reason this was not received by the defendants until twenty minutes past one. At one the defendants telegraphed revoking their offer, the message being received in New York at forty-three minutes past one. The plaintiffs held the defendants to their bargain, and both parties stand upon their rights.

There is no doubt that the reply was handed to the telegraph company promptly, and at least it would have been open to a jury to find that the plaintiffs had done all that was necessary on their part to complete the contract. If then the offer was outstanding when it was accepted, the contract was made. But the offer was outstanding. At the time when the acceptance was received, even, the revocation of the offer had not been received. It seems to us a reasonable requirement that, to disable the plaintiffs from accepting their offer, the defendants should bring home to them actual notice that it had been revoked. By their choice and act they brought about a relation between themselves and the plaintiffs which the plaintiffs could turn into a contract by an act on their part and authorized the plaintiffs to understand and to assume that that relation existed. When the plaintiffs acted in good faith on the assumption, the defendants could not complain. Knowingly to lead a person reasonably to suppose that you offer and to offer are the same thing. *O'Donnell v. Clinton*, 145 Mass. 461, 463; *Cornish v. Abington*, 4 H. & N. 549. The offer must be made before the acceptance, and it does not matter whether it is made a longer or a shorter time before, if by its express or implied terms it is outstanding at the time of the acceptance. Whether much or little time has intervened it reaches forward to the moment of

the acceptance, and speaks then. It would be monstrous to allow an inconsistent act of the offerer, not known or brought to the notice of the offeree, to affect the making of the contract; for instance, a sale by an agent elsewhere one minute after the principal personally has offered goods which are accepted within five minutes by the person to whom he is speaking. The principle is the same when the time is longer and the act relied on a step looking to but not yet giving notice. The contrary suggestion by Wilde, J., in *M'Culloch v. Eagle Ins. Co.*, 1 Pick. 278-279, is not adopted as a ground of decision, and the view which we take is that taken by the Supreme Court of the United States, and is now the settled law of England. *Taylor v. Merchants' Ins. Co.*, 9 How. 390, 400; *Patrick v. Bowman*, 149 U. S. 411, 424; *Byrne v. Van Tienhoven*, 5 C. P. D. 344; *Stevenson v. McLean*, 5 Q. B. D. 346; *Henthorn v. Fraser* [1892], 2 Ch. 27; *Thomson v. James*, 18 Ct. of Sess. Cas. (2d series) 1; *Langdell, Con.*, § 180; *Drew v. Nunn*, 4 Q. B. D. 661, 667; *Wheat v. Cross*, 31 Md. 99, 103; *Kempner v. Cohn*, 47 Ark. 519, 527.

It is unnecessary to consider other reasons which were urged for our decision.

Exceptions sustained.

SAMUEL P. QUICK, RESPONDENT, *v.* MARVIN WHEELER,
APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, SEPTEMBER 30, 1879.

[*Reported in 78 New York Reports 300.*]

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, affirming a judgment in favor of plaintiff, entered on a verdict, and affirming an order denying a motion for a new trial.

The nature of the action and the facts are set forth sufficiently in the opinion.

Alexander Cumming for appellant.

A. Taylor, for respondent.

EARL, J. This action was brought to recover the price of a quantity of tie timber which the plaintiff claimed to have sold and delivered to the defendant. The plaintiff recovered, and his judgment having been affirmed at the General Term, the defendant appealed to this Court.

The timber is claimed to have been delivered under a written contract with the defendant, which was executed August 2d,

1873. It provided first for the sale and delivery by the plaintiff to the defendant of 5000 feet of such timber. That part of the contract was fully performed by both parties. It then provided as follows: "And I, said Wheeler, also agree to pay said Quick 4½ cents per foot for from 6000 to 15,000 feet of same kind and quality of tie timber as aforesaid, and delivered at the place aforesaid during the winter, to be paid on June 1st, 1874." The contract was signed by both parties, but there was no agreement on the part of the plaintiff to deliver this last quantity. The place of delivery named in the contract was "on the bank of the west branch of the Delaware River at Ball's Eddy," and there plaintiff delivered the 11,355 feet of timber for which this recovery was had.

This contract when made was not binding, as it was based upon no consideration. The plaintiff parted with nothing and there was no mutuality. There was not the consideration which mutual promises give a contract. The plaintiff did not bind himself to sell and deliver the tie timber. Hence this contract can be treated only as a written offer on the part of the defendant to take and pay for the timber upon the terms stated. (Story on Sales, §§ 124, 126; Chitty on Contracts, 15; 1 Parsons on Contracts [5th ed.], 475; Tuttle v. Love, 7 J. R. 470.) This written offer could be revoked at any time before performance or a binding acceptance by the plaintiff. Was it thus revoked? All the evidence tending to show a revocation or rescission came from the plaintiff as a witness. He testified that in December, 1873, after he had delivered several thousand feet of the timber—about the time of the settlement for that delivered under the prior clause in the contract—the following conversation took place between them: "He told me that he did not want me to get out any more timber. I said I had bought some timber, and he had encouraged me to buy timber, and had advanced money to make payment, and I had bought it, so I could not get out of that, and I could not store it." Nothing more was said. The plaintiff then went on with the performance of the contract, and between that date and March delivered at the place designated in the contract the balance of the timber, the defendant at no time making any further objection. After the delivery plaintiff had the timber measured; and he then delivered a bill of the measurement at defendant's store, in his absence, on June 1st, 1874, to a man by the name of Titus, who promised to write to defendant. In July, plaintiff saw defendant and spoke to him about the timber, and he

¹ A portion of the opinion not relating to this question has been omitted.—ED.

said that as soon as his boys came home he would go and look at the timber ; and this promise he repeated afterward, making no claim then that the contract had been rescinded, or that he was not liable to pay for the timber, if it was according to the contract. Upon all these facts it cannot be said as matter of law that the parties understood that the offer was revoked. It is quite clear that the plaintiff did not so understand it, and it is at least doubtful if the defendant so understood it. It is true that he told the plaintiff not to get out any more timber ; but when he learned that the plaintiff had already got out a large quantity, and that he was bound for more, which he had purchased to perform this contract, he was silent, said nothing more. We may assume that he knew the defendant was engaged in performing the contract during the winter ; and after all the timber was delivered, he did not plant himself in any way upon a revocation of his offer ; but when informed that it had been delivered, promised to go and look at it. Proof of the revocation, under such circumstances, should have been unequivocal and satisfactory, before a court could hold as matter of law that the revocation was established. In this case, the question of revocation, upon the evidence, the conduct of the parties and the circumstances, was one for the jury ; and there was no request to have it submitted to the jury, and hence there was no error here.

Without more it is sufficient to say that we concur in the satisfactory opinion at General Term.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

(h) Termination of offer by lapse of time.

WILLIAM LORING AND ANOTHER v. CITY OF BOSTON.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH
TERM, 1844.

[*Reported in 7 Metcalf 409.*]

ASSUMPSIT to recover a reward of \$1000, offered by the defendants for the apprehension and conviction of incendiaries. Writ dated September 30th, 1841.

At the trial before Wilde, J., the following facts were proved : On May 26th, 1837, this advertisement was published in the

daily papers in Boston : “\$500 reward. The above reward is offered for the apprehension and conviction of any person who shall set fire to any building within the limits of the city. May 26th, 1837. Samuel A. Eliot, Mayor.” On May 27th, 1837, the following advertisement was published in the same papers : “\$1000 reward. The frequent and successful repetition of incendiary attempts renders it necessary that the most vigorous efforts should be made to prevent their recurrence. In addition to the other precautions, the reward heretofore offered is doubled. One thousand dollars will be paid by the city for the conviction of any person engaged in these nefarious practices. May 27th, 1837. Samuel A. Eliot, Mayor.” These advertisements were continued in the papers but about a week ; but there was no vote of the city government, or notice by the mayor, revoking the advertisements, or limiting the time during which they should be in force. Similar rewards for the detection of incendiaries had been before offered, and paid on the conviction of the offenders ; and at the time of the trial of this case, a similar reward was daily published in the newspapers.

In January, 1841, there was an extensive fire on Washington Stréet. when the Amory House (so called) and several others were burned. The plaintiffs suspected that Samuel Marriott, who then boarded in Boston, was concerned in burning said buildings. Soon after the fire said Marriott departed for New York. The plaintiffs declared to several persons their intention to pursue him and prosecute him, with the intention of gaining the reward of \$1000 which had been offered as aforesaid. They pursued said Marriott to New York, carried with them a person to identify him, arrested him, and brought him back to Boston. They then complained of him to the county attorney, obtained other witnesses, procured him to be indicted and prosecuted for setting fire to the said Amory House. And at the March Term, 1841, of the Municipal Court, on the apprehension and prosecution of said Marriott, and on the evidence given and procured by the plaintiffs, he was convicted of setting fire to said house, and sentenced to ten years’ confinement in the State prison.

William Barnicoat, called as a witness by the defendants, testified that he was chief engineer of the Fire Department in Boston, in 1837, and for several years after ; that alarms of fire were frequent before the said advertisement in May, 1837 ; but that from that time till the close of the year 1841 there were but few fires in the city.

As the only question in the case was, whether said offer of reward continued to be in force when the Amory House was burnt. the case was taken from the jury, by consent of the

parties, under an agreement that the defendants should be defaulted, or the plaintiffs become nonsuit, as the full Court should decide.

Peabody & J. P. Rogers for the plaintiffs.

J. Pickering (City Solicitor) for the defendants.

SHAW, C.J. There is now no question of the correctness of the legal principle on which this action is founded. The offer of a reward for the detection of an offender, the recovery of property, and the like, is an offer or proposal, on the part of the person making it, to all persons, which any one, capable of performing the service, may accept at any time before it is revoked, and perform the service ; and such offer on one side, and acceptance and performance of the service on the other, is a valid contract made on good consideration, which the law will enforce. That this principle applies to the offer of a reward to the public at large was settled in this Commonwealth, in *Symmes v. Frazier*, 6 Mass. 344, and it has been frequently acted upon, and was recognized in the late case of *Wentworth v. Day*, 3 Met. 352.

The ground of defence is, that the advertisement, offering the reward of \$1000 for the detection and conviction of persons setting fire to buildings in the city, was issued almost four years before the time at which the plaintiffs arrested Marriott and prosecuted him to conviction ; that this reward was so offered, in reference to a special emergency in consequence of several alarming fires ; that the advertisement was withdrawn and discontinued ; that the recollection of it had passed away ; that it was obsolete, and by most persons forgotten ; and that it could not be regarded as a perpetually continuing offer on the part of the city.

We are then first to look at the terms of the advertisement, to see what the offer was. It is competent to the party offering such reward to propose his own terms ; and no person can entitle himself to the promised reward without a compliance with all its terms. The first advertisement offering the reward demanded in this action was published March 26th, 1837, offering a reward of \$500 ; and another on the day following, increasing it to \$1000. No time is inserted, in the notice, within which the service is to be done for which the reward is claimed. It is therefore relied on as an unlimited and continuing offer.

In the first place, it is to be considered that this is not an ordinance of the city government, of standing force and effect ; it is an act temporary in its nature, emanating from the executive branch of the city government, done under the exigency of a special occasion indicated by its terms, and continued to be

published but a short time. Although not limited in its terms, it is manifest, we think, that it could not have been intended to be perpetual, or to last ten or twenty years, or more ; and therefore must have been understood to have some limit. It was insisted, in the argument, that it had no limit but the Statute of Limitations. But it is obvious that the Statute of Limitations would not operate so as to make six years from the date of the offer a bar. The offer of a reward is a proposal made by one party, and does not become a contract, until acted upon by the performance of the service by the other, which is the acceptance of such offer, and constitutes the agreement of minds essential to a contract. The six years, therefore, would begin to run only from the time of the service performed and the cause of action accrued, which might be ten, or twenty, or fifty years from the time of the offer, and would in fact leave the offer itself unlimited by time.

Supposing then that, by fair implication, there must be some limit to this offer, and there being no limit in terms, then by a general rule of law it must be limited to a *reasonable time*—that is, the service must be done within a reasonable time after the offer made.

What is a reasonable time, when all the facts and circumstances are proved on which it depends, is a question of law. To determine it, we are first to consider the objects and purposes for which such reward is offered. The principal object obviously must be, to awaken the attention of the public, to excite the vigilance and stimulate the exertions of police officers, watchmen and citizens generally, to the detection and punishment of offenders. Possibly, too, it may operate to prevent offences, by alarming the fears of those who are under temptation to commit them, by inspiring the belief that the public are awake, that any suspicious movement is watched, and that the crime cannot be committed with impunity. To accomplish either of these objects, such offer of a reward must be notorious, known and kept in mind by the public at large ; and, for that purpose, the publication of the offer, if not actually continued in newspapers, and placarded at conspicuous places, must have been recent. After the lapse of years, and after the publication of the offer has been long discontinued, it must be presumed to be forgotten by the public generally, and if known at all, known only to a few individuals who may happen to meet with it in an old newspaper. The expectation of benefit, then, from such a promise of reward, must in a great measure have ceased. Indeed, every consideration arising from the nature of the case confirms the belief that such offer of reward, for a special ser-

vice of this nature, is not unlimited and perpetual in its duration, but must be limited to some reasonable time. The difficulty is in fixing it. One circumstance, perhaps a slight one, is, that the act is done by a board of officers, who themselves are annual officers. But as they act for the city, which is a permanent body, and exercise its authority for the time being, and as such a reward might be offered near the end of the year, we cannot necessarily limit it to the time for which the same board of mayor and aldermen have to serve ; though it tends to mark the distinction between a temporary act of one branch and a permanent act of the whole city government.

We have already alluded to the fact of the discontinuance of the advertisement, as one of some weight. It is some notice to the public that the exigency has passed, for which such offer of a reward was particularly intended. And though such discontinuance is not a revocation of the offer, it proves that those who made it no longer hold it forth conspicuously as a continuing offer ; and it is not reasonable to regard it as a continuing offer for any considerable term of time afterward.

But it is not necessary, perhaps not proper, to undertake to fix a precise time, as reasonable time ; it must depend on many circumstances. It is somewhat analogous to the case of notes payable on demand, where the question formerly was, within what time such note must be presented, and, in case of dishonor, notice be given, in order to charge the indorser. In the earliest reported case on the subject, *Field v. Nickerson*, 13 Mass. 131, the Court went no farther than to decide that eight months was not a reasonable time for that purpose.

Under the circumstances of the present case, the Court are of opinion, that three years and eight months is not a reasonable time within which, or rather to the extent of which, the offer in question can be considered as a continuing offer on the part of the city. In that length of time, the exigency under which it was made having passed, it must be presumed to have been forgotten by most of the officers and citizens of the community, and cannot be presumed to have been before the public as an actuating motive to vigilance and exertion on this subject ; nor could it justly and reasonably have been so understood by the plaintiffs. We are therefore of opinion, that the offer of the city had ceased before the plaintiffs accepted and acted upon it as such, and that consequently no contract existed upon which this action, founded on an alleged express promise, can be maintained

Plaintiffs nonsuit.

RAMSGATE VICTORIA HOTEL COMPANY, LIMITED, v.
MONTEFIORE.

SAME v. GOLDSMID.

IN THE EXCHEQUER, JANUARY 17, 1866.

[Reported in Law Reports, 1 Exchequer 109.]

THESE were actions for non-acceptance of shares, and for calls, and cross-actions for recovery of deposit, and for damages for not duly allotting shares, turned into a special case.

The company was completely registered June 6th, 1864. By the second article of association it was provided that the company should continue incorporated, notwithstanding that the whole number of shares in the company might not be subscribed for or issued, and might commence and carry on business when, in the judgment of the board, a sufficient number of shares had been subscribed to justify them in so doing.

The prospectus of the company contained the following words: "Deposit on application £1 per share, and £4 on allotment." And it was further stated that if no allotment were made the deposit would be returned.

The defendant, Montefiore, on June 8th, 1864, filled up, signed, and sent to the directors the printed form of application annexed to the prospectus, which was as follows:

"GENTLEMEN: Having paid to your bankers the sum of £50, I hereby request you will allot me 50 shares of £20 each in the Ramsgate Victoria Hotel Company (Limited); and I hereby agree to accept such shares, or any smaller number that may be allotted to me, to pay the deposit and calls thereon, and to sign the articles of association of the company at such times and in such manner as you may appoint."

The defendant had so paid the sum of £50, and had taken from the bankers the following receipt:

"Received, June 8th, 1864, on account of the directors of the Ramsgate Victoria Hotel Company (Limited), the sum of £50, being the deposit paid in accordance with the terms of the prospectus, on an application for an allotment of 50 shares in the same undertaking."

On August 17th the secretary made out and submitted to the directors a list of applicants for shares up to that time, in which

appeared the name of the defendant for 50 shares. The list was headed "List of subscribers, August 17th, 1864."

On November 2d the secretary again submitted a list of subscribers to the directors, but they did not deem it advisable to proceed to an immediate allotment, and entered a minute to that effect. On November 8th the defendant, having received no communication from the company, withdrew his application.

On November 23d the secretary prepared another list of subscribers, including the defendant's name. The directors made the first call, and by their direction the secretary wrote the following letter to the defendant :

"SIR : I am instructed by the directors to acquaint you that, in compliance with your application, they have allotted to you 50 shares in this company, and have entered your name in the register of shareholders for the same ; and I have to request that you will pay the balance of the first call, as noted below, on or before December 15th, to the London and County Bank, 21 Lombard Street, E.C."

The defendant having refused to accept the shares or pay the call, the company brought the present action against him.

It was contended by the company that the last-mentioned list and those previously mentioned, or one of them, constituted a sufficient register of shares within the Companies' Act, 1862.

The directors had entered into an agreement for the purchase of the site of the hotel, paid the deposit, and commenced operations.

The facts with respect to Goldsmid were the same, except that he had never withdrawn his application, nor given any notice of his intention to do so.

Mellish, Q.C. (*Digby* with him) for the company.

M. Chambers, Q.C. (*Cohen* with him) for the defendants, were not called on.

THE COURT (POLLOCK, C.B., MARTIN, CHANNELL, PIGOTT, BB.), observed that in both the cases cited the question was as to the liability of an applicant for shares as a contributory, and they referred to the judgment of Turner, L.J., in *Ex parte Bloxam*,¹ as explaining the *ratio decidendi* in that case ; they held that there was no allotment till November 23d, that the allotment must be made within reasonable time, and that the interval from June to November was not reasonable, and therefore gave judgment for both the defendants.

¹ 33 L. J. (Ch.) 575-576.

ELIZABETH MACLAY v. JOHN HARVEY.

IN THE SUPREME COURT OF ILLINOIS, SEPTEMBER TERM, 1878.

[Reported in 90 Illinois Reports 525.]

APPEAL from the Circuit Court of Warren County ; the Hon. Arthur A. Smith, J., presiding.

John J. Glenn and *J. M. Kirkpatrick* for the appellant.

Stewart, Phelps & Grier for the appellee.

SCHOLFIELD, J., delivered the opinion of the Court.

Appellant brought *assumpsit* against appellee, in the Court below, on an alleged contract whereby the latter employed the former to take charge of the millinery department of his store in Monmouth, in this State, for the season commencing in April and ending in July, in the year 1876, and to pay her therefor \$15 per week.

The judgment was in favor of appellee, and appellant now assigns numerous errors as grounds for its reversal.

In our opinion the case may be properly disposed of by the consideration of a single question. Appellant's right of recovery is based entirely upon an alleged special contract, and unless there was such a contract, the judgment below is right, however erroneous may have been the rulings under which it was obtained.

After some preliminary correspondence, which is not before us, appellant, who was then residing in Peoria, received from appellee the following, by mail :

“ MONMOUTH, ILL., March 9, 1876.

“ MISS L. MACLAY, Peoria, Ill.:

“ I have been trying to find your address for some time, and was informed last evening that you were in Peoria. I write to inquire if you intend to work at millinery this season, and if you have made any arrangements or not. If you have not, can you take charge of my stock this season, and if we can agree I would want you for a permanent trimmer.

“ Please notify me by return mail, and terms, and we can confer further.

“ Yours in haste,

“ JOHN HARVEY.

“ Formerly Jno. Harvey & Co., when you trimmed for me.”

Appellant's reply to this is not before us. She says she stated

her terms in it, and thereafter appellee wrote her the following, which she also received by mail :

“ MONMOUTH, ILL., March 21, 1876.

“ MISS L. MACLAY, Peoria, Ill.:

“ Your favor was received in due time, and contents noted. You spoke of wages at \$15 per week and fare one way. You will want to go to Chicago, I presume, and trim a week or ten days.

“ I would like for you to trim at H. W. Wetherell's or at Keith Bros. I will give you \$15 per week and pay your fare from Chicago to Monmouth, and pay you the above wages for your *actual* time here in the house at that rate per *season*.

“ I presume that the wholesale men will allow you for your time in the house. You will confer a favor by giving me your answer by return mail.

“ Yours,

“ JOHN HARVEY.”

Appellant says she received this in the afternoon, and replied the next day by postal card, addressed to appellee, at Monmouth, as follows :

“ PEORIA, March 23.

“ MR. HARVEY :

“ Yours was promptly received, and I will go up to Chicago next week, and when my services are required you will let me know.

“ Very respectfully,

“ L. MACLAY.”

Appellant did not place this in the post-office herself, but she says she gave it to a boy who did errands about the house of her sister, with whom she was then staying, directing him to place it in the office. The postmark on the card, which is shown to be always placed on mail matter the same day it is put in the office, shows that the card was not mailed until March 25th.

Appellee receiving no reply from appellant on Monday morning, March 27th, went to Peoria and endeavored to engage another milliner, and failing in this, endeavored to find appellant, but was unable to do so, and then returned to Monmouth, when he received appellant's postal card, which had come to the office there during his absence. On Wednesday night, of the same week, appellee left Monmouth for Chicago, arriving at the last-named place on the following morning, Thursday, March 30th. Finding that appellant was neither at Keith Bros. nor at Wetherell's, he proceeded to employ another milliner,

and on the same day, and before leaving Chicago, wrote and mailed a letter directed to appellant's address at Peoria, notifying her of that fact; but this letter, in consequence of appellant's absence from Peoria, she did not receive for some time afterward.

The millinery season commences from April 5th to 10th, and ends from June 20th to July 4th, as shown by the evidence. Appellee had not laid in his spring stock when he was corresponding with appellant, and he started to New York, from Chicago, for that purpose, on the evening of the day on which he addressed the letter to appellant notifying appellant of his employment of another milliner, the evening of March 30th. Appellant says she left Peoria for Chicago on Friday, which must have been March 31st. On arriving at Chicago, she went to Wetherell's, and, failing to get employment there, did not go to Keith Bros., but went to another house in the same line of business, where she remained some days, and on April 8th she notified appellee, by letter, that she was sufficiently informed as to the "new ideas of trimming" and was ready to enter his service. Appellee replied to this, reciting the disappointments he claimed to have met with on her account, and again notifying her that he did not require her services.

If a contract was consummated between the parties, it was by the mailing of appellant's postal card on March 25th. Appellee's letter of the 21st cannot be regarded as the consummation of a contract, because it restates the terms with some variation, though it may be but slight, and requires an acceptance upon the terms thus stated. This, until unequivocally accepted, was only a mere proposition or offer. *Hough v. Brown*, 19 N. Y. (5 Smith) 111.

It was said by the Lord Chancellor, in *Dunlop v. Higgins*, first House of Lord's cases, at page 387: "Where an individual makes an offer by post, stipulating for, by the nature of the business having the right to expect, an answer by return of post, the offer can only endure for a limited time, and the making of it is accompanied by an implied stipulation that the answer shall be sent by return of post. If that implied stipulation is not satisfied, the person making the offer is released from it. When a person seeks to acquire a right, he is bound to act with a degree of strictness, such as may not be required where he is only endeavoring to excuse himself from a liability." This is regarded as a leading case on the question of acceptance of contract by letter, and the language quoted we regard as a clear and accurate statement of the law, as applicable to the present case. It is clear here, that the nature of the business

demand a prompt answer, and the words "you will confer a favor by giving me your answer by return mail" do, in effect, "stipulate" for an answer by return mail. *Taylor v. Rennie et al.*, 35 Barb. 272.

The evidence shows that there were two daily mails between Peoria and Monmouth—one arriving at Monmouth at 11 o'clock A.M., and the other at 6 o'clock P.M., and it did not require more than one day's time between the points. Appellee's letter to appellant making the offer, it will be remembered, bears date March 21st. Assuming the date of appellant's postal card (which, she says, was written on the morning after she received appellee's letter) to be correct, she received appellant's letter on the evening of the 22d. Appellee was, therefore, entitled to expect a reply mailed on the 23d, which he ought to have received on that day, or, at farthest, by the morning of the 24th; but appellant's reply was not mailed until the 25th. It does not relieve appellant of fault that she gave the postal card to a boy on the 23d, to have him mail it. Her duty was not to place an answer in private hands, but in the post-office. The boy was her agent, not that of appellee, and his negligence in mailing the postal card was her negligence.¹

The question of whether it would not have equally well subserved appellee's object had he treated the postal card of appellant as the consummation of a contract, is irrelevant. Appellant seeks to recover upon the strict letter of a special contract, and it is, therefore, incumbent on her to prove such contract. It is required of her, as we have seen, to prove an acceptance of appellee's offer within the time to which it was limited—that is to say, by the placing in the post-office of an answer unequivocally accepting the offer in time for the return mail, which she did not do. Appellee was, thereafter, under no obligation to regard the contract as closed. He might, it is true, have done so, but he was not legally bound in that respect, nor was he legally bound to notify appellant that her acceptance had not been signified within the time to which his offer was limited. She is legally chargeable with knowledge that her acceptance was not in time, and in order to fix a liability thereby upon appellee, it was incumbent upon her, before assuming that appellee waived this objection, to ascertain that he in fact did so.

Appellee was led, by the postal card of appellant, to believe

¹ The street boxes and street delivery are a legal part of the post-office system, and a letter deposited in one of these must be considered as being delivered at the post-office. *Abb. Trial Ev.* 433-434; *Bank v. De Groot*, 7 Hun 210; *Pearce v. Langfit*, 101 Pa. St. 507.—*Morse, J.*, *Wood v. Calnan*, 61 Mich. 402, 411.—ED.

that he would, when he arrived at Chicago on Thursday, find her either at Wetherell's or Keith Bros. Had he done so, it was his intention to treat the contract as closed ; but she was not there, and this intention was not acted upon, and so is to be considered as if it had never existed. Appellee, not finding appellant at Wetherell's or Keith Bros., as she had led him to believe he would, had no reason to assume that she was, in good faith, acting upon the assumption that her postal card had closed the contract, and he cannot, therefore, be held estopped from denying that it was not posted in time. In view of the lateness of the season, and the danger to appellee's business from delay, of all which appellant was aware, it cannot be said appellee acted with undue haste in engaging another milliner.

The judgment is affirmed.

Judgment affirmed.

DICKEY, J., dissenting :

I cannot concur in this decision. I think the special contract was made and assented to by both parties. I concede that the *delay* of Miss Maclay in mailing her postal card was such that the mere mailing of it on Saturday, March 25th, did not bind Harvey or consummate a contract. I agree that on Monday evening (the 27th), when he received that card, he had, at that time, the right, by law, to reject it, because it came too late, but, in my judgment, he *waived* that right. In the language of the governing opinion, appellee was "under no obligation to regard the contract as closed. He *might*, it is true, *have done so*"—that is, he might have "treated the postal card as the consummation of a contract."

The point on which I differ from my brethren is this : I think the evidence tends to show that he did, in fact, *waive* the delay ; that he did, in fact, treat "the postal card as the consummation of a contract ;" that he did "regard the contract as closed." He received on Monday evening her acceptance of his offer, with a statement, dated on the Thursday previous, that she would (in pursuance of the supposed contract) "go up to Chicago next week." If he intended to avail himself of her delay in sending her answer, and for that cause refuse to treat the contract as closed, it was his duty to notify her at once of his intention to do so. He remained silent three whole days, and permitted her to make her journey to Chicago on the faith of the supposed contract. Even had Harvey not intended to treat this as a contract consummated, his neglect to so notify her ought to estop him from saying he did not waive all objection on account of her delay in answering.

It is true, one cannot, on his own mere motion, impose upon

another, without his consent, the duty of rejecting an offer. In such case, the failure to reject an offer must not be held to be an acceptance. But in this case, special relations, as negotiators, had been established between these parties, at the instance of Harvey. The surroundings were such that common honesty demanded of him that he should notify her at once if he intended to object to her acceptance of his offer on the ground that it came too late. Not only was he silent, but he did, affirmatively, treat the contract as consummated. He started to Chicago on Wednesday evening, two days after he received her postal card, as he testifies, "expecting to find Miss Maclay in Chicago," and intending to confer with her about the business which was the subject of the contract. The expectation that he would meet her in Chicago was founded on the fact that he supposed she regarded the contract complete, and that she would, in pursuance thereof, be in Chicago.

A contract consists in the meeting of two minds at the same time on the same terms, and so made manifest to each. The proof tends to show, that on Wednesday, when Harvey started to Chicago, he regarded the contract as closed, and that at that time Miss Maclay, also at Peoria, regarded the contract as made and complete; and it also plainly shows, that Miss Maclay understood that Harvey was consenting thereto, and at the same time Harvey well understood that she was consenting thereto. He thought he had hired a trimmer—she thought she had contracted for employment as such.

Had Harvey found Miss Maclay at Chicago, and had she there at once refused to perform the contract, and had she thereby compelled him, at increased expense, to hire another trimmer, Harvey could, doubtless, have had an action against her for a breach of the contract. If she were bound, he ought also to be held bound by this contract.

It is suggested, that the failure of Miss Maclay to be found in Chicago on Thursday, in some way gave Harvey the right to cease treating this contract as closed. It is true, as a matter of fact, that Harvey expected Miss Maclay would be in Chicago on Thursday, preparing to execute the contract. It was no fault of hers that she was not there on that day. She had written the week previous, saying, "I will go up to Chicago next week." She kept her promise. She arrived at Chicago on Friday, March 31st. She had no intimation that Harvey expected to meet her there, or intended to go there at all. She was under no obligation to be there before Friday, and I cannot perceive how that fact can operate to release Harvey from what I regard as a binding contract.

DANIEL W. HORNE AND ANOTHER v. W. K. NIVER AND ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS,
FEBRUARY 25, 1897.*[Reported in 168 Massachusetts Reports 4.]*

CONTRACT for breach of an agreement to sell a certain quantity of coal. Trial in the Superior Court, without a jury, before Blodgett, J., who found for the defendants; and the plaintiffs alleged exceptions. The facts material to the point decided appear in the opinion.

W. H. Bent for the plaintiffs.

B. L. M. Tower for the defendants.

HOLMES, J. This is an action on an alleged contract to sell 400 tons of coal at \$2.50 a ton. On July 17th, 1895, the defendants wrote to the plaintiffs, offering "a very low figure on a small lot of our Columbia coal from Salem." The letter continued: "We beg to quote you \$2.50 on cars at that place, and should you deem it wise to favor us with an order of 500 or 600 tons, kindly wire us at our expense on receipt of this." On July 19th the plaintiffs replied, ordering 400 tons. The presiding judge, against the plaintiffs' request and exception, ruled that the answer was not in time to constitute a good acceptance, and found as a fact that the offer was not accepted according to its terms. The ruling was clearly right as applied to the written offer alone, since the offer did not purport to extend beyond the time for a reply by telegraph. *Eliason v. Henshaw*, 4 Wheat. 225; *Maclay v. Harvey*, 90 Ill. 525; and so far as appears the finding was justified. *Minneapolis & St. Louis Railway v. Columbus Rolling Mill*, 119 U. S. 149, 152. There was conflicting evidence of some conversation between the two letters, which is relied on as showing that the offer was treated as open; but as the judge found that the only oral agreement made was conditional upon the coal not having been all disposed of, as in fact it had been, the talk cannot help the plaintiffs.

The finding just mentioned made the plaintiffs' other requests for rulings as to a verbal extension of time or consent to an acceptance on July 19th immaterial.

Exceptions overruled.

(i) Termination of offer by counter offer or modified acceptance.

HYDE v. WRENCH.

IN CHANCERY, BEFORE LORD LANGDALE, M.R., DECEMBER 8,
1840.

[*Reported in 3 Beavan 334.*]

THIS case came on upon general demurrer to a bill for specific performance, which stated to the effect following :

The defendant being desirous of disposing of an estate, offered, by his agent, to sell it to the plaintiff for £1200, which the plaintiff, by his agent, declined ; and on June 6th the defendant wrote to his agent as follows : " I have to notice the refusal of your friend to give me £1200 for my farm ; I will only make one more offer, which I shall not alter from—that is, £1000 lodged in the bank until Michaelmas, when title shall be made clear of expenses, land tax, etc. I expect a reply by return, as I have another application." This letter was forwarded to the plaintiff's agent, who immediately called on the defendant ; and, previously to accepting the offer, offered to give the defendant £950 for the purchase of the farm, but the defendant wished to have a few days to consider.

On June 11th the defendant wrote to the plaintiff's agent as follows : " I have written to my tenant for an answer to certain inquiries, and the instant I receive his reply will communicate with you, and endeavor to conclude the prospective purchase of my farm. I assure you I am not treating with any other person about said purchase."

The defendant afterward promised he would give an answer about accepting the £950 for the purchase on June 26th ; and on the 27th he wrote to the plaintiff's agent, stating he was sorry he could not feel disposed to accept his offer for his farm at Luddenham at present.

This letter being received on June 29th, the plaintiff's agent on that day wrote to the defendant as follows : " I beg to acknowledge the receipt of your letter of the 27th instant informing me that you are not disposed to accept the sum of £950 for your farm at Luddenham. This being the case, I at once agree to the terms on which you offered the farm—viz., £1000 through your tenant, Mr. Kent, by your letter of the 6th instant. I shall be obliged by your instructing your solicitor to communicate with me without delay, as to the title, for the reason which I mentioned to you."

The bill stated that the defendant "returned a verbal answer to the last-mentioned letter, to the effect, he would see his solicitor thereon;" and it charged that the defendant's offer for sale had not been withdrawn previous to its acceptance.

To this bill, filed by the alleged purchaser for a specific performance, the defendant filed a general demurrer.

Kindersley and *Keene* in support of the demurrer.

Pemberton and *Freeling contra*.

MASTER OF THE ROLLS. Under the circumstances stated in this bill, I think there exists no valid binding contract between the parties for the purchase of the property. The defendant offered to sell it for £1000, and if that had been at once unconditionally accepted, there would undoubtedly have been a perfect binding contract; instead of that, the plaintiff made an offer of his own, to purchase the property for £950, and he thereby rejected the offer previously made by the defendant. I think that it was not afterward competent for him to revive the proposal of the defendant, by tendering an acceptance of it; and that, therefore, there exists no obligation of any sort between the parties; the demurrer must be allowed.

STEVENSON, JAQUES & CO. v. McLEAN.

IN THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION,
MAY 25, 1880.

[*Reported in Law Reports, 5 Queen's Bench Division 346.*]

FURTHER consideration before Lush, J. The facts and arguments sufficiently appear from the judgment.

Waddy, Q.C., and *Hugh Shield* for the plaintiffs.

Cave, Q.C., and *Wormald* for the defendant.

Cur. adv. vult.

LUSH, J. This is an action for non-delivery of a quantity of iron which it was alleged the defendant contracted to sell to the plaintiffs at 40s. per ton, net cash. The trial took place before me at the last assizes at Leeds, when a verdict was given for the plaintiffs for £1900, subject to further consideration on the question whether, under the circumstances, the correspondence between the parties amounted to a contract, and subject also, if the verdict should stand, to a reference, if required by the defendant, to ascertain the amount of damages. The question of law was argued before me on May 7th last.

The plaintiffs are makers of iron and iron merchants at Middlesborough. The defendant being possessed of warrants for iron, which he had originally bought of the plaintiffs, wrote on September 24th to the plaintiffs from London, where he carries on his business: "I see that No. 3 has been sold for immediate delivery at 39s., which means a higher price for warrants. Could you get me an offer for the whole or part of my warrants? I have 3800 tons, and the brands you know."

On the 26th one of the plaintiffs wrote from Liverpool: "Your letter has followed me here. The pig-iron trade is at present very excited, and it is difficult to decide whether prices will be maintained or fall as suddenly as they have advanced. Sales are being made freely for forward delivery chiefly, but not in warrants. It may, however, be found advisable to sell the warrants as maker's iron. I would recommend you to fix your price, and if you will write me your limit to Middlesborough, I shall probably be able to wire you something definite on Monday." This letter was crossed by a letter written on the same day by the clerk of one Fossick, the defendant's broker in London, and which was in these terms:

"Referring to R. A. McLean's letter to you *re* warrants, I have seen him again to-day, and he considers 39s. too low for same. At 40s. he says he would consider an offer. However, I shall be obliged by your kindly wiring me, if possible, your best offer for all or part of the warrants he has to dispose of."

On the 27th (Saturday) the plaintiffs sent to Fossick the following telegram:

"Cannot make an offer to-day; warrants rather easier. Several sellers think might get 39s. 6d. if you could wire firm offer subject reply Tuesday noon."

In answer to this Fossick wrote on the same day: "Your telegram duly to hand *re* warrants. I have seen Mr. McLean, but he is not inclined to make a firm offer. I do not think he is likely to sell at 39s. 6d., but will probably prefer to wait. Please let me know immediately you get any likely offer."

On the same day the defendant, who had then received the Liverpool letter of the 26th, wrote himself to the plaintiffs as follows:

"Mr. Fossick's clerk showed me a telegram from him yesterday mentioning 39s. for No. 3 as present price, 40s. for forward delivery. I instructed the clerk to wire you that I would now sell for 40s., net cash, open till Monday." No such telegram was sent by Fossick's clerk.

The plaintiffs were thus on the 28th (Sunday) in possession of both letters, the one from Fossick stating that the defendant

was not inclined to make a firm offer ; and the other from the defendant himself, to the effect that he would sell for 40s., net cash, and would hold it open all Monday. This it was admitted must have been the meaning of "open till Monday."

On the Monday morning, at 9.42, the plaintiffs telegraphed to the defendant : "Please wire whether you would accept forty for delivery over two months, or if not, longest limit you would give."

This telegram was received at the office at Moorgate at 10.1 A.M., and was delivered at the defendant's office in the Old Jewry shortly afterward.

No answer to this telegram was sent by the defendant, but after its receipt he sold the warrants, through Fossick, for 40s., net cash, and at 1.25 sent off a telegram to the plaintiffs : "Have sold all my warrants here for forty net to-day." This telegram reached Middlesborough at 1.46, and was delivered in due course.

Before its arrival at Middlesborough, however, and at 1.34, the plaintiffs telegraphed to defendant : "Have secured your price for payment next Monday—write you fully by post."

By the usage of the iron market at Middlesborough, contracts made on a Monday for cash are payable on the following Monday.

At 2.6 on the same day, after receipt of the defendant's telegram announcing the sale through Fossick, the plaintiffs telegraphed : "Have your telegram following our advice to you of sale, per your instructions, which we cannot revoke, but rely upon your carrying out."

The defendant replied : "Your two telegrams received, but your sale was too late ; your sale was not per my instructions." And to this the plaintiffs rejoined : "Have sold your warrants on terms stated in your letter of 27th."

The iron was sold by plaintiffs to one Walker at 41s. 6d., and the contract note was signed before 1 o'clock on Monday. The price of iron rapidly rose, and the plaintiffs had to buy in fulfilment of their contract at a considerable advance on 40s.

The only question of fact raised at the trial was, whether the relation between the parties was that of principal and agent, or that of buyer and seller. The jury found it was that of buyer and seller, and no objection has been taken to this finding.

Two objections were relied on by the defendant : First, it was contended that the telegram sent by the plaintiffs on the Monday morning was a rejection of the defendant's offer and a new proposal on the plaintiffs' part, and that the defendant had therefore a right to regard it as putting an end to the original negotiation

Looking at the form of the telegram, the time when it was sent, and the state of the iron market, I cannot think this is its fair meaning. The plaintiff Stevenson said he meant it only as an inquiry, expecting an answer for his guidance, and this, I think, is the sense in which the defendant ought to have regarded it.

It is apparent throughout the correspondence, that the plaintiffs did not contemplate buying the iron on speculation, but that their acceptance of the defendant's offer depended on their finding some one to take the warrants off their hands. All parties knew that the market was in an unsettled state, and that no one could predict at the early hour when the telegram was sent how the prices would range during the day. It was reasonable that, under these circumstances, they should desire to know before business began whether they were to be at liberty in case of need to make any and what concession as to the time or times of delivery, which would be the time or times of payment, or whether the defendant was determined to adhere to the terms of his letter; and it was highly unreasonable that the plaintiffs should have intended to close the negotiation while it was uncertain whether they could find a buyer or not, having the whole of the business hours of the day to look for one. Then, again, the form of the telegram is one of inquiry. It is not "I offer forty for delivery over two months," which would have likened the case to *Hyde v. Wrench*,¹ where one party offered his estate for £1000, and the other answered by offering £950. Lord Langdale, in that case, held that after the £950 had been refused, the party offering it could not, by then agreeing to the original proposal, claim the estate, for the negotiation was at an end by the refusal of his counter proposal. Here there is no counter proposal. The words are, "Please wire whether you would accept forty for delivery over two months, or, if not, the longest limit you would give." There is nothing specific by way of offer or rejection, but a mere inquiry, which should have been answered and not treated as a rejection of the offer. This ground of objection therefore fails.

The remaining objection was one founded on a well-known passage in Pothier, which has been supposed to have been sanctioned by the Court of Queen's Bench in *Cooke v. Oxley*,² that in order to constitute a contract there must be the assent or concurrence of the two minds at the moment when the offer is accepted; and that if, when an offer is made, and time is given to the other party to determine whether he will accept or reject it, the proposer changes his mind before the time arrives.

¹ 3 Beav. 334.

² 3 T. R. 653.

although no notice of the withdrawal has been given to the other party, the option of accepting it is gone. The case of *Cooke v. Oxley*¹ does not appear to me to warrant the inference which has been drawn from it, or the supposition that the judges ever intended to lay down such a doctrine. The declaration stated a proposal by the defendant to sell to the plaintiff 266 hogsheads of sugar at a specific price, that the plaintiff desired time to agree to, or dissent from, the proposal till four in the afternoon, and that defendant agreed to give the time, and promised to sell and deliver if the plaintiff would agree to purchase and give notice thereof before 4 o'clock. The Court arrested the judgment on the ground that there was no consideration for the defendant's agreement to wait till 4 o'clock, and that the alleged promise to wait was *nudum pactum*.

All that the judgment affirms is, that a party who gives time to another to accept or reject a proposal is not bound to wait till the time expires. And this is perfectly consistent with legal principles and with subsequent authorities, which have been supposed to conflict with *Cooke v. Oxley*.² It is clear that a unilateral promise is not binding, and that if the person who makes an offer revokes it before it has been accepted, which he is at liberty to do, the negotiation is at an end. See *Routledge v. Grant*.³ But in the absence of an intermediate revocation, a party who makes a proposal by letter to another is considered as repeating the offer every instant of time till the letter has reached its destination and the correspondent has had a reasonable time to answer it. *Adams v. Lindsell*.⁴ "Common sense tells us," said Lord Cottenham, in *Dunlop v. Higgins*,⁵ "that transactions cannot go on without such a rule." It cannot make any difference whether the negotiation is carried on by post, or by telegraph, or by oral message. If the offer is not retracted, it is in force as a continuing offer till the time for accepting or rejecting it has arrived. But if it is retracted, there is an end of the proposal. *Cooke v. Oxley*,⁶ if decided the other way, would have negatived the right of the proposing party to revoke his offer.

Taking this to be the effect of the decision in *Cooke v. Oxley*,⁷ the doctrine of Pothier before adverted to, which is undoubtedly contrary to the spirit of English law, has never been affirmed in our Courts. Singularly enough, the very reasonable proposition that a revocation is nothing till it has been communicated to the other party, has not, until recently, been laid down, no case having apparently arisen to call for a decision upon the

¹ 3 T. R. 653.² 4 Bing. 653.³ 1 H. L. C. 381.⁴ *Ibid.*⁵ *Ibid.*⁶ 1 B. & A. 681.⁷ 3 T. R. 653.

point. In America it was decided some years ago that "an offer cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted." *Tayloe v. Merchants' Fire Insurance Co.*,¹ and in *Byrne & Co. v. Leon Van Tienhoven & Co.*² my Brother Lindley, in an elaborate judgment, adopted this view, and held that an uncommunicated revocation is, for all practical purposes and in point of law, no revocation at all.

It follows, that as no notice of withdrawal of his offer to sell at 40s., net cash, was given by the defendant before the plaintiffs sold to Walker, they had a right to regard it as a continuing offer, and their acceptance of it made the contract, which was initiated by the proposal, complete and binding on both parties.

My judgment must, therefore, be for the plaintiffs for £1900, but this amount is liable to be reduced by an arbitrator to be agreed on by the parties, or, if they cannot agree within a week, to be nominated by me. If no arbitrator is appointed, or if the amount be not reduced, the judgment will stand for £1900. The costs of the arbitration to be in the arbitrator's discretion.

Judgment for the plaintiffs.

MINNEAPOLIS & ST. LOUIS RAILWAY v. COLUMBUS ROLLING MILL.

IN THE SUPREME COURT OF THE UNITED STATES, NOVEMBER 29,
1886.

[*Reported in 119 United States 149.*]

THIS was an action by a railroad corporation established at Minneapolis in the State of Minnesota against a manufacturing corporation established at Columbus in the State of Ohio. The petition alleged that on December 19th, 1879, the parties made a contract by which the plaintiff agreed to buy of the defendant, and the defendant sold to the plaintiff 2000 tons of iron rails of the weight of 50 pounds per yard, at the price of \$54 per ton gross, to be delivered free on board cars at the defendant's rolling mill in the month of March, 1880, and to be paid for by the plaintiff in cash when so delivered. The answer denied the making of the contract. It was admitted at the trial that the following letters and telegrams were sent at their dates.

¹ 9 How. Sup. Court Rep. 390.

² 49 L. J. (C. P.) 316.

and were received in due course, by the parties, through their agents :

December 5th, 1879. Letter from plaintiff to defendant :

" Please quote me prices for 500 to 3000 tons 50 lb. steel rails, and for 2000 to 5000 tons 50 lb. iron rails, March, 1880, delivery."

December 8th, 1879. Letter from defendant to plaintiff :

" Your favor of the 5th inst. at hand. We do not make steel rails. For iron rails, we will sell 2000 to 5000 tons of 50 lb. rails for fifty-four (\$54) dollars per gross ton for spot cash, F. O. B. cars at our mill, March delivery, subject as follows : In case of strike among our workmen, destruction of or serious damage to our works by fire or the elements, or any causes of delay beyond our control, we shall not be held accountable in damages. If our offer is accepted, shall expect to be notified of same prior to December 20th, 1879."

December 16th, 1879. Telegram from plaintiff to defendant :

" Please enter our order for 1200 tons rails, March delivery, as per your favor of the 8th. Please reply."

December 16th, 1879. Letter from plaintiff to defendant :

" Yours of the 8th came duly to hand. I telegraphed you to-day to enter our order for twelve hundred (1200) tons 50 lb. iron rails for next March delivery, at fifty-four (\$54) dollars F. O. B. cars at your mill. Please send contract. Also please send me templet of your 50 lb. rail. Do you make splices? If so, give me prices for splices for this lot of iron."

December 18th, 1879. Telegram from defendant to plaintiff, received same day :

" We cannot book your order at present at that price."

December 19th, 1879. Telegram from plaintiff to defendant :

" Please enter an order for 2000 tons rails, as per your letter of the 6th. Please forward written contract. Reply."

[The word " sixth" was admitted to be a mistake for " eighth."]

December 22d, 1879. Telegram from plaintiff to defendant :

" Did you enter my order for 2000 tons rails, as per my telegram of December 19th? Answer."

After repeated similar inquiries by the plaintiff, the defendant, on January 19th, 1880, denied the existence of any contract between the parties.

The jury returned a verdict for the defendant, under instructions which need not be particularly stated ; and the plaintiff alleged exceptions, and sued out this writ of error.

Eppa Hunton for plaintiff in error. *C. N. Olds* and *L. J. Critchfield* filed a brief for same.

Richard A. Harrison for defendant in error, submitted on his brief.

GRAY, J., after making the foregoing statement of the case, delivered the opinion of the Court.

The rules of law which govern this case are well settled. As no contract is complete without the mutual assent of the parties, an offer to sell imposes no obligation until it is accepted according to its terms. So long as the offer has been neither accepted nor rejected, the negotiation remains open, and imposes no obligation upon either party ; the one may decline to accept, or the other may withdraw his offer ; and either rejection or withdrawal leaves the matter as if no offer had ever been made. A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterward revive it by tendering an acceptance of it. *Eliason v. Henshaw*, 4 Wheat. 225 ; *Carr v. Duval*, 14 Pet. 77 ; *National Bank v. Hall*, 101 U. S. 43, 50 ; *Hyde v. Wrench*, 3 Beavan, 334 ; *Fox v. Turner*, 1 Bradwell, 153. If the offer does not limit the time for its acceptance, it must be accepted within a reasonable time. If it does, it may, at any time within the limit and so long as it remains open, be accepted or rejected by the party to whom, or be withdrawn by the party by whom, it was made. *Boston & Maine Railroad v. Bartlett*, 3 Cush. 224 ; *Dickinson v. Dodds*, 2 Ch. D. 463.

The defendant, by the letter of December 8th, offered to sell to the plaintiff 2000 to 5000 tons of iron rails on certain terms specified, and added that if the offer was accepted the defendant would expect to be notified prior to December 20th. This offer, while it remained open, without having been rejected by the plaintiff or revoked by the defendant, would authorize the plaintiff to take at his election any number of tons not less than 2000 nor more than 5000, on the terms specified. The offer, while unrevoked, might be accepted or rejected by the plaintiff at any time before December 20th. Instead of accepting the offer made, the plaintiff, on December 16th, by telegram and letter, referring to the defendant's letter of December 8th, directed the defendant to enter an order for 1200 tons on the same terms.

The mention, in both telegram and letter, of the date and the terms of the defendant's original offer, shows that the plaintiff's order was not an independent proposal, but an answer to the defendant's offer, a qualified acceptance of that offer, varying the number of tons, and therefore in law a rejection of the offer. On December 18th the defendant by telegram declined to fulfil the plaintiff's order. The negotiation between the parties was thus closed, and the plaintiff could not afterward fall back on the defendant's original offer. The plaintiff's attempt to do so, by the telegram of December 19th, was therefore ineffectual and created no rights against the defendant.

Such being the legal effect of what passed in writing between the parties, it is unnecessary to consider whether, upon a fair interpretation of the instructions of the Court, the question whether the plaintiff's telegram and letter of December 16th constituted a rejection of the defendant's offer of December 8th was ruled in favor of the defendant as matter of law, or was submitted to the jury as a question of fact. The submission of a question of law to the jury is no ground of exception if they decide it aright. *Pence v. Langdon*, 99 U. S. 578.

Judgment affirmed.

(j) *Termination of offer by death or insanity.*

WERNER, ADMINISTRATOR, ETC., v. HUMPHREYS.

IN THE COMMON PLEAS, EASTER TERM, 1841.

[*Reported in 2 Manning & Granger* 853.]

DEBT for goods sold and delivered by the intestate, and on an account stated with the intestate; and for goods sold and delivered by, and upon an account stated with M. Triquet, deceased, as administratrix.

The defendant pleaded, first, to the whole declaration *nunquam indebitatus*; secondly, to the first two counts payment; and thirdly, to the same counts a set-off; on which pleas issue was taken and joined.

At the trial before the under-sheriff of Middlesex, in January last, it appeared that the action was brought to recover the sum of £4 16s., the price of a coat, which the intestate had been employed to make for the defendant. The coat, which was made out of Triquet's own materials, had been tacked together, and tried on by the defendant, previously to Triquet's death, but was not completed and delivered until four days afterward.

Triquet having died intestate, his widow too obtained letters of administration ; and on her death the plaintiff, who was her father, took out administration *de bonis non*.

It being admitted that the set-off was an answer to the first two counts, the question was, whether the plaintiff could recover on the third. The under-sheriff told the jury that if they were of opinion that the coat was so nearly finished in the intestate's lifetime as only to require some trifling work to be done to it afterward, they ought to find for the defendant ; and he left it to them to say whether the coat was not made and completed "or so nearly so" in the lifetime of the intestate, as to be a coat sold and delivered by him. The jury having found a verdict for the defendant,

Channell, in Hilary Term last, obtained a rule *nisi* for a new trial, on the ground of misdirection.

Bompas now showed cause. The result of the evidence was that the coat was substantially finished and delivered in the intestate's lifetime. There was no contract with the administratrix, so as to enable the plaintiff to recover on the third count. If the coat was sold by the intestate and delivered after his death, that ought to have been alleged in the declaration, and the defendant is consequently entitled to a verdict on the plea of *nunquam indebitatus*.

Channell in support of the rule. There was no sale of the coat in the lifetime of the intestate. There was a delivery and an acceptance of it four days after his death. The coat not being finished in the intestate's lifetime, clearly passed to his administratrix as part of his assets. The defendant could not have maintained trover against her for the coat, even if he had tendered the price ; and in case it had been accidentally destroyed, the administratrix must have borne the loss. It is clear that the coat was completed by her ; and, therefore, the defendant entered into a new contract with her. In *Marshall v. Broadhurst*, 1 Tyrwh. 348, 1 C. & J. 403, a testator, having contracted to build a wooden gallery, died before it was begun, and it was erected by his executors after his death. It was held that they were entitled to sue for work and labor done, and materials found by them, as executors ; for the sum recovered would be assets.

TINDAL, C.J. It appears to me upon the evidence that the coat was in an unfinished state at the death of the intestate ; and if so, no property in it had passed to the defendant, but it vested in the administratrix, and it was in her option whether to complete it or not. And if the coat had been accidentally destroyed by fire, the loss would not have fallen upon the de-

fendant, but upon the administratrix ; which is one of the tests to show that no property in it had vested in the former. Then if the property in the coat vested in the administratrix on the intestate's decease, and she finished and delivered it afterward, it seems to me that such coat was delivered under a new contract made by her with the defendant. I think the third count in the declaration, which alleges a sale and delivery by the administratrix, exactly meets the case. The summing up of the under-sheriff was clearly incorrect ; for he withdrew the attention of the jury from that count ; and, consequently, there must be a new trial.

BOSANQUET, J. The question is, whether there was not a sale and delivery of the coat by the administratrix, so as to entitle the plaintiff to recover upon the third count. It appeared to be clear upon the evidence that the coat was not completed in the intestate's lifetime, and that it was not delivered until some days after. The under-sheriff was undoubtedly wrong in his direction to the jury.

COLTMAN, J. The question is whether the plaintiff was not entitled to recover upon the third count ; and that depends upon whether there was any transfer of the property in the coat in the intestate's lifetime. It seems to me that there was not. The coat was made of the intestate's own materials, and the trying of it on effected no transfer of the property, which remained in the intestate until his death. When the coat was afterward delivered to the defendant by the administratrix in a finished state, it was a delivery by her, and formed a good foundation for an action for goods sold and delivered by her, in her representative character. It is clear that the defendant could not have maintained trover for the coat at the death of the intestate.

ERSKINE, J. There was no evidence of a sale of the coat by the intestate in his lifetime. It appeared that the coat was made out of the intestate's own materials, and that after it was tacked together, it was tried on by the defendant. Although that showed an *intention* on the part of the intestate to appropriate that identical coat to the defendant, it is clear that no property in it passed to the latter in the lifetime of the former, but that it vested in the administratrix, and that the subsequent delivery was a sale and delivery by her in that character.

Rule absolute.

EBEN D. JORDAN AND OTHERS v. ELIZABETH
DOBBINS, ADMINISTRATRIX.IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS,
MARCH 1, 1877.*[Reported in 122 Massachusetts Reports 168.]*

CONTRACT upon the following guaranty: "For value received, the receipt whereof is hereby acknowledged, the undersigned does hereby guaranty to Jordan, Marsh & Co. the prompt payment by George E. Moore to Jordan, Marsh & Co., at maturity, of all sums of money and debts which he may hereafter owe Jordan, Marsh & Co. for merchandise, which they may from time to time sell to him, whether such debts be on book account, by note, draft or otherwise, and also any and all renewals of any such debt. The undersigned shall not be compelled to pay on this guaranty a sum exceeding \$1000, but this guaranty shall be a continuing guaranty, and apply to and be available to said Jordan, Marsh & Co., for all sales of merchandise they may make to said George E. Moore until written notice shall have been given by the undersigned to said Jordan, Marsh & Co. and received by them, that it shall not apply to future purchases. Notice of the acceptance of this guaranty and of sales under the same, and demand upon said George E. Moore for payment, and notice to me of non-payment, is hereby waived. In witness whereof I, the undersigned, have hereunto set my hand and seal this twenty-eighth day of February, A.D. 1873. William Dobbins. (Seal.)" Annexed to the declaration was an account of goods sold to Moore.

The case was submitted to the Superior Court, and, after judgment for the plaintiffs, to this Court, on appeal, on an agreed statement of facts in substance as follows:

The plaintiffs are partners under the firm name of Jordan, Marsh & Co., and the defendant is the duly appointed administratrix of the estate of William Dobbins.

William Dobbins, on February 28th, 1873, executed and delivered to the plaintiffs the above written contract of guaranty. The plaintiffs thereafter, relying on this contract, sold to said Moore the goods mentioned in the account annexed to the declaration, at the times and for the prices given in said account, all of the goods having been sold and delivered to Moore between January 16th and May 28th, 1874. All the amounts claimed were due from Moore, and payment was duly demanded of him and of the defendant before the date of the writ. Other

goods had been sold by the plaintiffs to Moore between the date of the guaranty and the first date mentioned in the account, but these had been paid for.

William Dobbins died on August 6th, 1873, and the defendant was appointed administratrix of his estate on September 2d, 1873. The plaintiffs had no notice of his death until after the last of the goods mentioned in the account had been sold to Moore.

If upon these facts the defendant was liable, judgment was to be entered for the plaintiffs for the amount claimed ; otherwise judgment for the defendant.

M. Storey for the plaintiffs.

D. S. Richardson & G. F. Richardson for the defendant.

MORTON, J. An agreement to guarantee the payment by another of goods to be sold in the future, not founded upon any present consideration passing to the guarantor, is a contract of a peculiar character. Until it is acted upon, it imposes no obligation and creates no liability of the guarantor. After it is acted upon, the sale of the goods upon the credit of the guaranty is the only consideration for the conditional promise of the guarantor to pay for them.

The agreement which the guarantor makes with the person receiving the guaranty is not that I now become liable to you for anything, but that if you sell goods to a third person, I will then become liable to pay for them if such third person does not. It is of the nature of an authority to sell goods upon the credit of the guarantor, rather than of a contract which cannot be rescinded except by mutual consent. Thus such a guaranty is revocable by the guarantor at any time before it is acted upon.

In *Offord v. Davies*, 12 C. B. (N. S.) 748, the guaranty was of the due payment for the space of twelve months of bills to be discounted, and the Court held that the guarantor might revoke it at any time within the twelve months, and that the plaintiff could not recover for bills discounted after such revocation. The ground of the decision was that the defendant's promise by itself created no obligation, but was in the nature of a proposal which might be revoked at any time before it was acted on.

Such being the nature of a guaranty, we are of opinion that the death of the guarantor operates as a revocation of it, and that the person holding it cannot recover against his executor or administrator for goods sold after the death. Death terminates the power of the deceased to act, and revokes any authority or license he may have given, if it has not been executed or acted upon. His estate is held upon any contract upon which a liability exists at the time of his death, although it may de-

pend upon future contingencies. But it is not held for a liability which is created after his death, by the exercise of a power or authority which he might at any time revoke.

Applying these principles to the case at bar, it follows that the defendant is entitled to judgment. The guaranty is carefully drawn, but it is in its nature nothing more than a simple guaranty for a proposed sale of goods. The provision, that it shall continue until written notice is given by the guarantor that it shall not apply to future purchases, affects the mode in which the guarantor might exercise his right to revoke it, but it cannot prevent its revocation by his death. The fact that the instrument is under seal cannot change its nature or construction. No liability existed under it against the guarantor at the time of his death, but the goods for which the plaintiffs seek to recover were all sold afterward.

We are not impressed by the plaintiff's argument that it is inequitable to throw the loss upon them. It is no hardship to require traders, whose business it is to deal in goods, to exercise diligence so far as to ascertain whether a person upon whose credit they are selling is living.

The decision in *Bradbury v. Morgan*, 1 H. & C. 249, upon which the plaintiffs rely, was rested upon reasoning which appears to us to be unsatisfactory and inconsistent with the opinion of the same Court a year before, in *Westhead v. Sproson*, 6 H. & N. 728, and with the decision in *Offord v. Davies*, *ubi supra*, at the argument of which *Bradbury v. Morgan* was cited; and it has not since been treated as settling the law of England. *Harriss v. Fawcett*, L. R. 15 Eq. 311, and L. R. 8 Ch. 866. The reasons of the similar decision in *Bank of South Carolina v. Knotts*, 10 Rich. 543, are open to the same objections.

Judgment for the defendant.

DREW v. NUNN.

IN THE COURT OF APPEAL, MAY 30, 1879.

[*Reported in Law Reports, 4 Queen's Bench Division 661.*]

THIS was an action brought by a tradesman to recover the price of goods supplied to the defendant's wife upon her order while the defendant was insane.¹ The following facts were proved at the trial before Mellor, J.

¹ Although involving in terms only the effect of the insanity of a principal upon the authority of an agent, the case is inserted in this section.—ED.

The wife of the defendant began to deal with the plaintiff in 1872; the defendant had been present when some of the goods were ordered by his wife, and also had paid for some of them. The defendant became ill in 1873, and in the month of November he instructed his agent to pay all his income to his wife, and empowered her to draw checks upon his bankers. He became insane in December, and was confined in an asylum until April, 1877. While the defendant was in the asylum, his wife ordered goods from the plaintiff, who supplied them to her upon credit. The plaintiff was ignorant that the defendant was insane and had been placed under restraint in an asylum, and he did not know that the defendant's income was paid to his wife. In April, 1877, the defendant recovered the use of his reason, and in the June following revoked any authority which he might have given to his wife either to act as his agent or to pledge his credit.

Mellor, J., refused to ask the jury whether the income of the defendant's wife during his confinement in the asylum was sufficient to maintain her, and directed the jury that the plaintiff was entitled to recover, if what the defendant's wife did was according to the course pursued while the defendant lived with her. The jury found a verdict for the plaintiff.

The defendant applied to the Queen's Bench Division for a new trial; but the application was refused. Upon appeal to this Court, an order *nisi* for a new trial was granted upon the ground of misdirection.

Willis, Q.C. (R. O. B. Lane with him) for the plaintiff showed cause. The direction of Mellor, J., was right. Insanity does not revoke an authority to pledge the credit of the person becoming insane, if the person giving credit is unaware that it has supervened. The defendant had so conducted himself that the plaintiff was entitled to assume that the defendant's wife was authorized to act as his agent, and therefore *Jolly v. Rees*¹ has no application to the present case, which falls within the principle to be deduced from *Ryan v. Sams*.² A lunatic is liable upon a reasonable contract entered into by him, if the contractee did not know that he was insane. *Browne v. Joddrell*;³ *Baxter v. Earl of Portsmouth*;⁴ *Molton v. Camroux*.⁵ In this case the plaintiff did not know that the defendant was insane, and therefore it does not fall within the principle acted upon by

¹ 15 C. B. (N. S.) 628; 33 L. J. (C. P.) 177.

² 12 Q. B. 460; 17 L. J. (Q. B.) 271.

³ Mood. & M. 105.

⁴ 5 B. & C. 170; *sub nom.* Bagster v. Earl of Portsmouth, 7 D. & R. 614.

⁵ 2 Ex. 487; 18 L. J. (Ex.) 68, in Ex. Ch. 4 Ex. 17; 18 L. J. (Ex.) 356.

Patteson, J., in *Dane v. Viscountess Kirkwall*.¹ Even in equity the contract of a lunatic could not be set aside, if it was fair and had been entered into without notice of his malady. *Niell v. Morley*.² It has been said that a lunatic cannot appoint an agent; but this doctrine must be taken subject to some limitation. In *Stead v. Thornton*,³ the defendant at the time when he received the money must have known that his alleged principal was insane. It was said by Parke, B., in *Tarbuck v. Bispham*,⁴ that "a lunatic is not competent to appoint an agent;" but this dictum was merely intended to point out that, after insanity has supervened, the person afflicted cannot appoint an agent. It was decided in *Read v. Legard*⁵ that a husband is liable for necessities supplied to his wife during the period of his lunacy; but it may be conceded for the plaintiff, that that case is not material here, because it was decided upon the ground of the relation existing between husband and wife; and upon a similar principle, in *Richardson v. Du Bois*,⁶ it was decided that an insane husband was not liable, he not having held out to the plaintiff his wife as his agent. In *Davidson v. Wood*⁷ proof was allowed against the estate of a testator for money advanced to his wife during his lunacy and applied by her in payment of her expenses.

[BRAMWELL, L.J. *Davidson v. Wood*⁸ is not in point for the case before us; it was simply a case of liability in respect of necessities, and in equity, although not at law, a husband was bound to repay money advanced to her in order to be expended in necessities.⁹]

The defendant's counsel may rely upon Story on Agency, ch. xviii., par. 481, but the authorities cited in the note thereto (7th ed.) seem to throw doubt upon the doctrine laid down in the text. The authorities are collected in Chitty on Contracts, ch. ii., p. 133 (10th ed.), and they show plainly that a lunatic is liable upon a contract into which he enters with a person dealing with him *bonâ fide*. In *Manby v. Scott*¹⁰ three of the judges held that an idiot was liable for necessities supplied to him as a housekeeper.

Horne Payne for the defendant. Mellor, J., misdirected the jury. Upon the facts proved the plaintiff was not entitled to a finding in his favor. The general rule is that a lunatic cannot

¹ 8 C. & P. 679.

² 9 Ves. 478.

³ 3 B. & Ad. 357, n.

⁴ 2 M. & W. 2, at p. 8.

⁵ 6 Ex. 636; 20 L. J. (Ex.) 309.

⁶ Law Rep. 5 Q. B. 51.

⁷ 1 D. J. & S. 465; 32 L. J. (Ch.) 400.

⁸ *Ibid.*

⁹ See *Jenner v. Morris*, 3 D. F. & J. 45; 30 L. J. (Ch.) 361.

¹⁰ 1 Sid. 112.

enter into contract ; he may be liable for necessities, but it is not found that the goods supplied were necessities for the defendant's wife. A lunatic is incapable of contracting marriage (Browning v. Reane¹) ; he cannot bind himself by any contract which may impose a burden upon him (Howard v. Digby²) ; he cannot appoint an agent (Stead v. Thornton ;³ Tarbuck v. Bispham⁴). In Story on Agency, ch. ii., par. 6, it is laid down in broad terms that idiots and lunatics are wholly incapable of appointing an agent. A man incapable of managing his affairs, and of judging of the consequences of his acts, ought not to be held responsible upon contracts for goods which are not necessities. Upon the death of the principal, the authority of the agent is terminated ; a wife cannot bind her husband's estate after his death (Blades v. Free⁵) ; nor is a wife personally liable who contracts upon her husband's behalf in ignorance of his decease (Smout v. Ilbery⁶). A similar principle ought to be applied in the present case. A lunatic is as incapable of acting as if he were dead, and he ought not to be held responsible for the acts of an agent appointed while he was sane. Owing to his mental weakness he has no power of controlling the agent or of disavowing acts alleged to be done upon his behalf.

Cur. adv. vult.

The following judgments were delivered :

BRETT, L.J. This appeal has stood over for a long time, principally on my account, in order to ascertain whether it can be determined upon some clear principle. I have found, however, that the law upon this subject stands upon a very unsatisfactory footing.

The action was tried before Mellor, J., and was brought to recover the price of boots and shoes supplied by the plaintiff to the defendant's wife while the defendant was insane. It is beyond dispute that the defendant, when sane, had given his wife absolute authority to act for him, and held her out to the plaintiff as clothed with that authority. Afterward the defendant became insane so as to be unable to act upon his own behalf, and his insanity was such as to be apparent to any one with whom he might attempt to enter into a contract. While he was in this state of mental derangement, his wife ordered the goods from the plaintiff, who had no notice of the defendant's insanity, and was supplied with them by him. The defendant was for some time confined in a lunatic asylum, but he afterward recovered his reason, and he has defended the action upon the ground

¹ 2 Phillim. Eccl. Cas. 69.

² 2 Cl. & F. 634, at p. 661.

³ 3 B. & Ad. 357, n.

⁴ 2 M. & W. 2, at p. 8, per Parke, B.

⁵ 9 B. & C. 167.

⁶ 10 M. & W. 1.

that by his insanity the authority which he gave to his wife was terminated, and that he is not liable for the price of the goods supplied pursuant to her order. Mellor, J., left no question to the jury as to the extent of the defendant's insanity, but in effect directed them as matter of law that the plaintiff was entitled to recover. I think it must be taken that the defendant's insanity existed to the extent which I have indicated.

Upon this state of facts two questions arise. Does insanity put an end to the authority of the agent? One would expect to find that this question has been long decided on clear principles; but on looking into Story on Agency, Scotch authorities, Pothier, and other French authorities, I find that no satisfactory conclusion has been arrived at. If such insanity as existed here did not put an end to the agent's authority, it would be clear that the plaintiff is entitled to succeed; but in my opinion insanity of this kind does put an end to the agent's authority. It cannot be disputed that some cases of change of status in the principal put an end to the authority of the agent; thus the bankruptcy and death of the principal, the marriage of a female principal, all put an end to the authority of the agent. It may be argued that this result follows from the circumstance that a different principal is created. Upon bankruptcy the trustee becomes the principal; upon death the heir or devisee as to realty, the executor or administrator as to personalty; and upon the marriage of a female principal her husband takes her place. And it has been argued that by analogy the lunatic continues liable until a fresh principal—namely, his committee, is appointed. But I cannot think that this is the true ground, for executors are, at least in some instances, bound to carry out the contracts entered into by their testators. I think that the satisfactory principle to be adopted is that, where such a change occurs as to the principal that he can no longer act for himself, the agent whom he has appointed can no longer act for him. In the present case a great change had occurred in the condition of the principal. He was so far afflicted with insanity as to be disabled from acting for himself; therefore his wife, who was his agent, could no longer act for him. Upon the ground which I have pointed out, I think that her authority was terminated. It seems to me that an agent is liable to be sued by a third person, if he assumes to act on his principal's behalf after he had knowledge of his principal's incompetency to act. In a case of that kind he is acting wrongfully. The defendant's wife must be taken to have been aware of her husband's lunacy; and if she had assumed to act on his behalf with any one to whom he himself had not held her out as his agent, she would have been

acting wrongfully, and, but for the circumstance that she is married, would have been liable in an action to compensate the person with whom she assumed to act on her husband's behalf. In my opinion, if a person who has not been held out as agent assumes to act on behalf of a lunatic, the contract is void against the supposed principal, and the pretended agent is liable to an action for misleading an innocent person.

The second question then arises, what is the consequence where a principal, who has held out another as his agent, subsequently becomes insane, and a third person deals with the agent without notice that the principal is a lunatic? Authority may be given to an agent in two ways. First, it may be given by some instrument, which of itself asserts that the authority is thereby created, such as a power of attorney; it is of itself an assertion by the principal that the agent may act for him. Secondly, an authority may also be created from the principal holding out the agent as entitled to act generally for him. The agency in the present case was created in the manner last mentioned. As between the defendant and his wife, the agency expired upon his becoming to her knowledge insane; but it seems to me that the person dealing with the agent without knowledge of the principal's insanity has a right to enter into a contract with him, and the principal, although a lunatic, is bound so that he cannot repudiate the contract assumed to be made upon his behalf. It is difficult to assign the ground upon which this doctrine, which, however, seems to me to be the true principle, exists. It is said that the right to hold the insane principal liable depends upon contract. I have a difficulty in assenting to this. It has been said also that the right depends upon estoppel. It cannot see that an estoppel is created. But it has been said also that the right depends upon representations made by the principal and entitling third persons to act upon them, until they hear that those representations are withdrawn. The authorities collected in *Story on Agency*, ch. xviii., § 481, p. 610 (7th ed.), seem to base the right upon the ground of public policy; it is there said in effect that the existence of the right goes in aid of public business. It is, however, a better way of stating the rule to say that the holding out of another person as agent is a representation upon which, at the time when it was made, third parties had a right to act, and if no insanity had supervened would still have had a right to act. In this case the wife was held out as agent, and the plaintiff acted upon the defendant's representation as to her authority without notice that it had been withdrawn. The defendant cannot escape from the consequences of the repre-

sensation which he has made ; he cannot withdraw the agent's authority as to third persons without giving them notice of the withdrawal. The principal is bound, although he retracts the agent's authority, if he has not given notice and the latter wrongfully enters into a contract upon his behalf. The defendant became insane and was unable to withdraw the authority which he had conferred upon his wife. He may be an innocent sufferer by her conduct, but the plaintiff, who dealt with her *bonâ fide*, is also innocent, and where one of two persons both innocent must suffer by the wrongful act of a third person, that person making the representation which, as between the two, was the original cause of the mischief, must be the sufferer and must bear the loss. Here it does not lie in the defendant's mouth to say that the plaintiff shall be the sufferer.

A difficulty may arise in the application of a general principle such as this is. Suppose that a person makes a representation which after his death is acted upon by another in ignorance that his death has happened : in my view the estate of the deceased will be bound to make good any loss which may have occurred through acting upon that representation. It is, however, unnecessary to decide this point to-day.

Upon the grounds above stated I am of opinion that, although the authority of the defendant's wife was put an end to by his insanity, and although she had no authority to deal with the plaintiff, nevertheless the latter is entitled to recover, because the defendant while he was sane made representations to the plaintiff, upon which he was entitled to act until he had notice of the defendant's insanity, and he had no notice of the insanity until after he had supplied the goods for the price of which he now sues. The direction of Mellor, J., was right.

BRAMWELL, L.J. I agree with the judgment just delivered by Brett, L.J. It must be taken that the defendant told the plaintiff that his wife had authority to bind him ; when that authority had been given, it continued to exist, so far as the plaintiff was concerned, until it was revoked and until he received notice of that revocation. It may be urged that this doctrine does not extend to insanity, which is not an intentional revocation ; but I think that insanity forms no exception to the general law as to principal and agent. It may be hard upon an insane principal, if his agent abuses his authority ; but, on the other hand, it must be recollected that insanity is not a privilege, it is a misfortune, which must not be allowed to injure innocent persons ; it would be productive of mischievous consequences if insanity annulled every representation made by the person afflicted with it without any notice being

given of his malady. If the argument for the defendant were correct, every act done by him or on his behalf after he became insane must be treated as a nullity. The limits of the doctrine as to the liability of an insane person may be uncertain, and it may not be possible to lay down any broad rule ; but I think that the facts before us resemble the case of a guarantee. Suppose that a promise is made that, if the promisee will supply goods to a person named, the promisor will see that they are paid for, and suppose that the promisor intends to put an end to his liability, but that before he can give notice to the promisee, the latter supplies goods to the person named ; surely the promisor is liable for the price ; for the transaction between the promisor and promisee was equivalent to an agreement or license which was to continue to exist, until it should be revoked by the promisor, and until notice of that revocation should be received by the promisee.

It has been assumed by Brett, L.J., that the insanity of the defendant was such as to amount to a revocation of his wife's authority. I doubt whether partial mental derangement would have that effect. I think that in order to annul the authority of an agent, insanity must amount to dementia. If a man becomes so far insane as to have no mind, perhaps he ought to be deemed dead for the purpose of contracting. I think that the direction of Mellor, J., was right.

BRETT, L.J. I am requested by Cotton, L.J., to state that he agrees with the conclusion at which we have arrived ; but that he does not wish to decide whether the authority of the defendant's wife was terminated, or whether the liability of a contractor lasts until a committee has been appointed. He bases his decision simply upon the ground that the defendant, by holding out his wife as agent, entered into a contract with the plaintiff that she had authority to act upon his behalf, and that until the plaintiff had notice that this authority was revoked he was entitled to act upon the defendant's representations.

I wish to add that if there had been any real question as to the extent of the defendant's insanity, it ought to have been left to the jury ; and that as no question was asked of the jury, I must assume that the defendant was insane to the extent which I have mentioned. I may remark that from the mere fact of mental derangement it ought not to be assumed that a person is incompetent to contract ; mere weakness of mind or partial derangement is insufficient to exempt a person from responsibility upon the engagements into which he has entered.

Appeal dismissed.

THOMAS A. BEACH ET AL. v. THE FIRST METHODIST
EPISCOPAL CHURCH.

IN THE SUPREME COURT OF ILLINOIS, SEPTEMBER 25, 1880.

[*Reported in 96 Illinois Reports 177.*]

APPEAL from the Appellate Court for the Second District ; heard in that Court on appeal from the Circuit Court of Livingston County ; the Hon. N. J. Pillsbury, J., presiding.

L. E. Payson, *S. S. Lawrence*, and *D. L. Murdock* for the appellants.

H. H. McDowell and *C. C. Strawn* for the appellee.

DICKEY, C. J., delivered the opinion of the Court.

The record shows that Lorenzo Beach had presented to him a subscription paper in the following words :

“ FAIRBURY, February 14, 1874.

“ We, the undersigned, agree to pay the sum set opposite our respective names, for the purpose of erecting a new M. E. church in this place, said sums to be paid as follows : One third to be paid when contract is let, one third when building is enclosed, one third when building is completed. Probable cost of said church from ten thousand dollars (\$10,000) to twelve thousand dollars (\$12,000).”

To which he attached and subscribed the following :

“ FAIRBURY, 1874.

“ Dr. Beach gives this subscription on the condition that the remainder of eight thousand dollars is subscribed.

“ Lorenzo Beach, \$2000.”

On April 20th, 1875, Lorenzo Beach was adjudged by the County Court of Livingston County, insane, and Thomas A. Beach and C. C. Bartlett were appointed conservators of his person and property, and they continued to act as such until the death of Dr. Beach, which occurred in August, 1878.

Other subscriptions to the amount of \$8000 toward the building of this church were obtained. The construction of the church was begun about September of 1876 ; and while there is some dispute on the question of whether the church was ever fully finished, for the purposes of this opinion we will assume that the building was finished before June, 1877. About June, 1877, the church was badly damaged by a hurricane. In September, 1877, when the trustees and members of the congregation were consulting as to the propriety of immediately repairing

the same, one of the conservators of the person and property of Dr. Beach, being at the meeting, it is said, pledged the society the prompt and full payment of the unpaid residue of the subscription. This unpaid residue was about \$666—the conservators having paid the first two instalments of the subscription after the building of the church was begun.

This action was brought shortly before the death of Dr. Beach for the last instalment of the subscription, \$666. After his death his heirs were made parties, under a stipulation, and defended the action.

In the Circuit Court judgment was rendered for the unpaid one third of the subscription and costs. On appeal to the Appellate Court, that judgment was affirmed. The defendants appeal to this Court.

The subscription made by Dr. Beach was, in its nature, a mere offer to pay that amount of money to the church upon the condition therein expressed.

There is nothing in the record tending to show that the church, in this case, took any action, upon the faith of this subscription, until after Dr. Beach was adjudged insane, or that the church paid money or incurred any liability. His insanity, by operation of law, was a revocation of the offer. In *Pratt, Administratrix, etc., v. The Trustees of the Baptist Society of Elgin*, 93 Ill. 475, this Court said, in relation to such a subscription: "The promise, in such case, stands as a mere offer, and may, by necessary implication, be revoked at any time before it is acted upon. It is the expending of money, etc., or incurring of legal liability on the faith of a promise, which gives the right of action, and without which there is no right of action. Until acted upon, there is no mutuality, and, being only an offer, and susceptible of revocation at any time before being acted upon, it follows that the death of the promisor, before the offer is acted upon, is a revocation of the offer. . . . The continuance of an offer is in the nature of its constant repetition, which, of course, necessarily requires some one capable of making a repetition. Obviously this can no more be done by a dead man than a contract can, in the first instance, be made by a dead man."

The ground upon which the Court rested its judgment in the *Pratt Case* was the want of capacity on the part of the promisor to continue his promise or offer. The insanity of Dr. Beach rendered him, in law, as incapable of making a contract or of continuing or repeating an offer to the church as if he had been actually dead.

Conservators of the person and property of an insane man

may perform personal contracts of their ward legally subsisting, under some circumstances ; but in this case there was no contract between Dr. Beach and the church. The paper signed by Dr. Beach was of such a nature that no binding contract sprung therefrom until the church had accepted the same by incurring some legal liability, or expending money upon the faith of it. There being no binding contract upon Dr. Beach at the time that his conservators made the payments, they had no lawful authority to make the same, and the estate of Dr. Beach was not bound thereby.

The judgment of the Appellate Court in this case must be reversed and the cause remanded.

Judgment reversed.

THE IMPERIAL LOAN COMPANY, LIMITED, v. STONE.

IN THE COURT OF APPEAL, MARCH 3, 1892.

[*Reported in Law Reports, 1 Queen's Bench* (1892) 599.]

APPLICATION for a new trial.

The action was brought on a promissory note which the defendant, who had since the making of the note been found by inquisition to be a lunatic, signed as surety.¹ The statement of defence alleged that the defendant when he signed the note was so insane as to be incapable of understanding what he was doing, and this allegation was repeated with the further allegation added that the insanity of the defendant was known to the plaintiffs.

The case was tried before Denman, J., who left to the jury the questions whether the defendant, when he signed the note, was so insane as not to be capable of understanding what he did, and whether this incapacity was known to the agent of the plaintiffs who was present when the note was signed. The jury found that the defendant was insane when he signed the note ; but they could not agree upon the question as to the knowledge of the plaintiffs' agent. The learned judge entered a verdict for the defendant. The plaintiffs applied for judgment or for a new trial.

Channell, Q.C., and *Le Riche* in support of the application.

Witt, Q.C., and *G. A. Scott* for the defendant.

LORD ESHER, M.R. In this case judgment has been entered

¹ Although involving in terms only the question of the capacity of an insane person to contract the case is inserted in this section.—ED.

for the defendant on the findings of the jury, although the jury have not agreed on one of the questions left to them. If we are of opinion that the entry of judgment is wrong, no other course is open to us but to direct a new trial.

The action is on a promissory note signed by the defendant as surety, and his answer is that he was so insane at the time he signed the note that he was not capable of understanding the transaction, and the jury have found that this was so. The defence added another matter—namely, that the plaintiffs knew of the defendant's state, and on that point the jury have been unable to agree. This raises the questions whether that allegation is a necessary part of the plea, and if so on whom the burden of proving it lies.

I shall not try to go through the cases bearing on the subject; but what I am about to state appears to me to be the result of all the cases. When a person enters into a contract, and afterward alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.

It can hardly be doubted that for a long series of years, if insanity was set up in answer to an action for breach of contract, it must have been pleaded, and the plea was not good unless it went on to allege knowledge on the part of the plaintiff. The fact of such a plea being required, and having to go to that extent, shows that the law as I have stated it was generally accepted. The burden of proof, in such a case, must lie on the defendant; the jury have disagreed on a material question in the cause, and as there is no finding on that question the case must go back for a new trial.

FRY, L.J. I also disagree with the conclusion of the learned judge. The law relating to this matter I take to be of very old date, and much light is thrown upon it by Littleton in his treatise on Tenures. That learned author, in treating of descents, laid down (Litt. § 405) that "no man of full age shall be received in any plea by the law to stultify and disable his own person;" but he went on to point out that the heir can avoid a deed made by a person *non compos mentis*, though the person himself could not. The subject came before the Court of King's Bench in Beverley's Case,¹ where the Court laid down, "that every deed, feoffment, or grant, which any man *non compos*

¹ 4 Co. Rep. 123b.

mentis makes, is avoidable, and yet shall not be avoided by himself, because it is a maxim in law that no man of full age shall be, in any plea to be pleaded by him, received by the law to stultify himself," and reference was made to Littleton's Tenures. Before that date Fitzherbert (F. N. Br. 202 D.) took a different view; but his view was overruled by Stroud v. Marshal.¹ Then came Coke, who adopted the view of Littleton (Co. Litt. 247*b*), who, he said, was of opinion "that neither by plea nor by writ nor otherwise, he himselfe shall avoid it, but his heire (in respect his ancestor was *non compos mentis*) shall avoid it by entrie, plea, or writ. And herewith the greatest authorities of our bookes agree; and so it was resolved with Littleton in Beverley's Case,² where it is said, that it is a maxim of the common law, that the partie shall not disable himselfe." Therefore, although in certain cases the Crown, and in other cases persons who claimed under one who was *non compos mentis*, could set up the disability, the man himself could not. In Molton v. Camroux,³ which was affirmed in the Exchequer Chamber,⁴ Pollock, C.B., in delivering the judgment of the Court, said the rule had in modern times been relaxed, and unsoundness of mind would now be a good defence to an action upon a contract, if it could be shown that the defendant was not of capacity to contract, "and the plaintiff knew it," and for this he referred to Browne v. Joddrell;⁵ Baxter v. Earl of Portsmouth;⁶ and Dane v. Viscountess Kirkwall.⁷ It thus appears that there has been grafted on the old rule the exception that the contracts of a person who is *non compos mentis* may be avoided when his condition can be shown to have been known to the plaintiff. So far as I know, that is the only exception. The question whether that knowledge exists has not been determined in this case, and consequently we cannot say that the exception applies, and judgment could not properly be entered for the defendant. There must, therefore, be a new trial.

LOPES, L.J. It seems to me that the principle to be deduced from the cases may be summarized thus: A contract made by a person of unsound mind is not voidable at that person's option if the other party to the contract believed at the time he made the contract that the person with whom he was dealing was of sound mind. In order to avoid a fair contract on the ground of insanity, the mental incapacity of the one must be known to the other of the contracting parties. A defendant who seeks to avoid a contract on the ground of his insanity must plead and prove not merely his incapacity, but also the plaintiff's knowl-

¹ Cro. Eliz. 398.² 2 Ex. 487.³ 1 Mood. & M. 105.⁴ 8 C. & P. 679.⁵ 4 Co. Rep. 123*b*.⁶ 4 Ex. 17.⁷ 5 B. & C. 170.

edge of that fact, and unless he proves these two things he cannot succeed. Applying that in the present case, it is apparent that the verdict entered for the defendant cannot stand, but that there must be a new trial.

Order for new trial.

SECTION II.—CONSIDERATION.¹

(a) *Distinction between motive and consideration.*

ELEANOR THOMAS v. BENJAMIN THOMAS.

IN THE QUEEN'S BENCH, FEBRUARY 5, 1842.

[*Reported in 2 Queen's Bench Reports* 851.]

ASSUMPSIT. The declaration stated an agreement between plaintiff and defendant that the defendant should, when thereto required by the plaintiff, by all necessary deeds, conveyances,

¹ The mystery of consideration has possessed a peculiar fascination for writers upon the English Law of Contract. No fewer than three distinct theories of its origin have been put forward within the last eight years. According to one view, "the requirements of consideration in all parol contracts is simply a modified generalization of *quid pro quo* to raise a debt by parol."* On the other hand, consideration is described as "a modification of the Roman principle of *causa*, adopted by equity, and transferred thence into the common law."† A third learned writer derives the action of *assumpsit* from the action on the case for deceit, the damage to the plaintiff in that action being the forerunner of the "detriment to the promisee," which constitutes the consideration of all parol contracts.‡

To the present writer it seems impossible to refer consideration to a single source. At the present day it is doubtless just and expedient to resolve every consideration into a detriment to the promisee incurred at the request of the promisor. But this definition of consideration would not have covered the cases of the sixteenth century. There were then two distinct forms of consideration: (1) detriment; (2) a precedent debt. Of these detriment was the more ancient, having become established, in substance, as early as 1504. On the other hand, no case has been found recognizing the validity of a promise to pay a precedent debt before 1542. These two species of consideration, so different in their nature, are, as would be surmised, of distinct origin. The history of detriment is bound up with the history of special *assumpsit*, whereas the consideration based upon a precedent debt must be studied in the development of *indebitatus assumpsit*.—Ames, *The History of Assumpsit*, 1 *Harvard Law Review* 1.—ED.

* Holmes, *Early English Equity*, 1 *L. Q. Rev.* 171; *The Common Law*, 285. A similar opinion had been previously advanced by Professor Langdell, *Contracts*, § 47.

† Salmon 1, *History of Contract*, 3 *L. Q. Rev.* 166, 178.

‡ Hare, *Contracts*, ch. vii. and viii.

assignments, or other assurances, grants, etc., or otherwise, assure a certain dwelling house and premises, in the county of Glamorgan, unto plaintiff for her life, or so long as she should continue a widow and unmarried, and that plaintiff should, at all times during which she should have possession of the said dwelling house and premises, pay to defendant and one Samuel Thomas (since deceased), their executors, administrators or assigns, the sum of £1 yearly toward the ground rent payable in respect of the said dwelling house and other premises thereto adjoining, and keep the said dwelling house and premises in good and tenantable repair. That the said agreement being made, in consideration thereof, and of plaintiff's promise to perform the agreement, Samuel Thomas and the defendant promised to perform the same; and that, although plaintiff afterward and before the commencement of the suit, to wit, etc., required of defendant to grant, etc., by a necessary and sufficient deed, etc., the said dwelling house, etc., to plaintiff for her life, or while she continued a widow, and though she had then continued, etc., and still was a widow and unmarried, and although she did, to wit, on etc., tender to the defendant for his execution a certain necessary and sufficient deed, etc., proper and sufficient for the conveyance, etc., and although, etc. (general readiness of plaintiff to perform), yet defendant did not nor would then or at any other time convey, etc.

Pleas. 1. *Non assumpsit*. 2. That there was not the consideration alleged in the declaration for the defendant's promise. 3. Fraud and covin.

Issues thereon.

At the trial, before Coltman, J., at the Glamorganshire Lent Assizes, 1841, it appeared that John Thomas, the deceased husband of the plaintiff, at the time of his death, in 1837, was possessed of a row of seven dwelling houses in Merthyr Tidvil, in one of which, being the dwelling house in question, he was himself residing; and that by his will he appointed his brother Samuel Thomas (since deceased) and the defendant executors thereof, to take possession of all his houses, etc., subject to certain payments in the will mentioned, among which were certain charges in money for the benefit of the plaintiff. In the evening before the day of his death he expressed orally a wish to make some further provision for his wife; and on the following morning he declared orally, in the presence of two witnesses, that it was his will that his wife should have either the house in which he lived and all that it contained, or an additional sum of £100 instead thereof.

This declaration being shortly afterward brought to the

knowledge of Samuel Thomas and the defendant, the executors and residuary legatees, they consented to carry the intentions of the testator so expressed into effect ; and, after the lapse of a few days, they and the plaintiff executed the agreement declared upon ; which, after stating the parties, and briefly reciting the will, proceeded as follows :

“ And, whereas the said testator, shortly before his death, declared, in the presence of several witnesses, that he was desirous his said wife should have and enjoy during her life, or so long as she should continue his widow, all and singular the dwelling house,” etc., “ or £100 out of his personal estate,” in addition to the respective legacies and bequests given her in and by his said will ; “ but such declaration and desire was not reduced to writing in the lifetime of the said John Thomas and read over to him ; but the said Samuel Thomas and Benjamin Thomas are fully convinced and satisfied that such was the desire of the said testator, and are willing and desirous that such intention should be carried into full effect. Now these presents witness, and it is hereby agreed and declared by and between the parties, that, in consideration of such desire and of the premises,” the executors would convey the dwelling house, etc., to the plaintiff and her assigns during her life, or for so long a time as she should continue a widow and unmarried ; “ provided, nevertheless, and it is hereby further agreed and declared, that the said Eleanor Thomas, or her assigns, shall and will, at all times during which she shall have possession of the said dwelling house, etc., pay to the said Samuel Thomas and Benjamin Thomas, their executors, etc., the sum of £1 yearly toward the ground rent payable in respect of the said dwelling house and other premises thereto adjoining, and shall and will keep the said dwelling house and premises in good and tenantable repair ;” with other provisions not affecting the questions in this case.

The plaintiff was left in possession of the dwelling house and premises for some time ; but the defendant, after the death of his co-executor, refused to execute a conveyance tendered to him for execution pursuant to the agreement, and, shortly before the trial, brought an ejectment, under which he turned the plaintiff out of possession. It was objected for the defendant that, a part of the consideration proved being omitted in the declaration, there was a fatal variance. The learned judge overruled the objection, reserving leave to move to enter a nonsuit. Ultimately a verdict was found for the plaintiff on all the issues ; and, in Easter Term last, a rule *nisi* was obtained pursuant to the leave reserved.

Chilton and *W. M. James* now showed cause.

E. V. Williams contra.

LORD DENMAN, C.J. There is nothing in this case but a great deal of ingenuity, and a little wilful blindness to the actual terms of the instrument itself. There is nothing whatever to show that the ground rent was payable to a superior landlord ; and the stipulation for the payment of it is not a mere proviso, but an express agreement. (His Lordship here read the proviso.) This is in terms on express agreement, and shows a sufficient legal consideration quite independent of the moral feeling which disposed the executors to enter into such a contract. Mr. Williams's definition of consideration is too large ; the word *causa* in the passage referred to means one which confers what the law considers a benefit on the party. Then the obligation to repair is one which might impose charges heavier than the value of the life estate.

PATTESON, J. It would be giving to *causa* too large a construction if we were to adopt the view urged for the defendant ; it would be confounding consideration with motive.¹ Motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff ; it may be some benefit to the plaintiff, or some detriment to the defendant ; but at all events it must be moving from the plaintiff. Now that which is suggested as the consideration here, a pious respect for the wishes of the testator, does not in any way move from the plaintiff ; it moves from the testator ; therefore, legally speaking, it forms no part of the consideration. Then it is said that, if that be so, there is no consideration at all, it is a mere voluntary gift ; but when we look at the agreement we find that this is not a mere proviso that the donee shall take the gift with the burdens ; but it is an express agreement to pay what seems to be a fresh apportionment of a ground rent, and which is made payable not to a superior landlord, but to the executors. So that this rent is clearly not something incident to the assignment of the house, for in that case, instead of being payable to the executors, it would have been payable to the landlord. Then as to the repairs, these houses may very possibly be held under a lease containing covenants to repair ; but we know nothing about it, for anything that appears the liability to repair is first created by this instrument. The proviso certainly struck me at first as Mr. Williams put it, that the rent and repairs were merely attached to the gift by the donors ; and, had the instrument been executed by the donors only, there might have been some

¹ See note (1), p. , *post*.

ground for that construction ; but the fact is not so. Then it is suggested that this would be held to be a mere voluntary conveyance as against a subsequent purchaser for value ; possibly that might be so, but suppose it would, the plaintiff contracts to take it, and does take it, whatever it is, for better for worse, perhaps a *bonâ fide* purchase for a valuable consideration might override it, but that cannot be helped.

COLERIDGE, J. The concessions made in the course of the argument have, in fact, disposed of the case. It is conceded that mere motive need not be stated, and we are not obliged to look for the legal consideration in any particular part of the instrument, merely because the consideration is usually stated in some particular part ; *ut res magis valeat*, we may look to any part. In this instrument, in the part where it is usual to state the consideration, nothing certainly is expressed but a wish to fulfil the intentions of the testator, but in another part we find an express agreement to pay an annual sum for a particular purpose, and also a distinct agreement to repair. If these had occurred in the first part of the instrument, it could hardly have been argued that the declaration was not well drawn and supported by the evidence. As to the suggestion of this being a voluntary conveyance, my impression is that this payment of £1 annually is more than a good consideration, it is a valuable consideration, it is clearly a thing newly created and not part of the old ground rent.

Rule discharged.¹

¹ In a commentary on the Code Civil, in Codes Français Expliqués, etc., by J. A. Rogron, Paris, 1836, the words of the Code, " L'obligation sans cause, ou sur un fausse cause, ou sur un cause illicite, ne peut avoir aucun effet " (*ante*, p. 857) are discussed ; and the note upon " sans cause " is as follows :

" La cause est ce qui détermine l'engagement que prend une partie dans un contrat ; il ne faut pas la confondre avec la cause implicite du contrat, autrement le *motif* qui porte à contracter. La cause de l'engagement d'une partie est le fait ou la promesse de l'autre partie ; elle peut aussi consister dans une pure libéralité de la part de l'une des parties : ainsi, lorsque je m'oblige à payer mille francs à Paul, pour tels services que son père m'a rendus, la cause déterminante du contrat, ce sont les services qui m'ont été rendus ; le *motif* qui m'a porté à contracter, c'est le désir de m'acquitter envers lui des services de son père ; si celui-ci ne m'a jamais rendu les services dont il a été parlé dans l'acte, le contrat est sans cause. Je m'oblige à donner mille francs à Paul pour qu'il suive une affaire pendante devant le tribunal de la Seine : la cause déterminante est la promesse de Paul qu'il suivra mon affaire ; si elle est jugée irrévocablement au moment où nous avons stipulé, le contrat est sans cause. Autre exemple : je vous vends ma maison ; la cause de la vente est, d'un côté, la maison elle-même, de l'autre, le prix. Enfin je donne, dans la forme des dispositions entre vifs, ma maison à Paul, qui, l'accepte : ma libéralité est ici la seule cause du contrat." P. 209.

PHILPOT v. GRUNINGER.

IN THE SUPREME COURT OF THE UNITED STATES, DECEMBER TERM, 1871.

[*Reported in 14 Wallace 570.*]

ERROR to the Circuit Court for the Northern District of Illinois ; the case being this :

On October 19th, 1864, Gruninger, by articles of agreement, sold, or agreed to sell, to B. Philpot and H. Picket, residing at Titusville, Pa. (who, with George Sherman, of Philadelphia, had been speculating in oil wells), a well "on the Blood Farm," near the town named ; Philpot and Picket agreeing by the articles to pay Gruninger \$3500 within thirty days. The money was not thus paid. Gruninger, after the sale, went to Massachusetts, but by February 24th, 1865, had returned to Titusville. On the day just mentioned Picket writes to him expressing satisfaction at his return, and acknowledging the receipt of a letter from him "some time since ; an answer to which had been neglected on account of press of business until it had passed out of mind," and saying :

"I think we can fix up that Blood Farm matter satisfactorily when you come up."

By April 21st, 1865, Philpot, Picket, and the Sherman already named had become interested as partners, under the name of Philpot, Sherman & Co., in the well on Blood Farm (if indeed Sherman had not been partner with the other two from the first) and in other oil wells ; and on that day the partnership, under the firm name, along with several other projectors in oil (not, however, including Gruninger) entered into an agreement to form a joint-stock company ; Philpot, Sherman & Co. agreeing to put into the company certain wells, but not this one, which they had bought or agreed to buy, on the Blood Farm.

On May 6th, 1865, Gruninger also agreed to put in a certain well which *he* still owned—one on the Smith Farm—and on the same day, by deed, witnessed and acknowledged, "in consideration of the sum of \$3000," which was acknowledged to have been to him "paid, and the receipt of which he acknowledged," conveyed to Philpot, Sherman & Co., the already mentioned well on the Blood Farm. On that same day, but without reciting on account of what transaction, Philpot gave the firm note for \$3000, payable to Gruninger on demand.

The joint-stock company apparently fell through. Gruninger, at any rate, would not put in his well on Smith's farm.

On July 5th Picket, one of the persons to whom Gruninger had agreed to sell the well on the Blood Farm, and a member of the now admitted firm of Philpot, Sherman & Co., writes to Gruninger from Titusville, signing the firm name :

"We have learned that the note given you by our firm has been sent to Philadelphia for collection. All I can say is, we are, at present, unable to pay it. The change in times has so contracted our means as to make it doubtful if we are able to pay your note in cash at all. We will be glad to settle with you by letting you have some good property any time ; but money, at the present time, is out of the question with us. Let us hear from you soon."

And on the same day Philpot, in Philadelphia, writes to him from there :

"The note given by me to you has been presented by a collector for payment. We think this a strange proceeding under the circumstances the note was obtained, and a part having been paid. We have your name to a contract assigning us your interest in well on the Smith Farm, and we would recommend that you withdraw that note, and, as soon as convenient, meet us in Philadelphia, when a satisfactory adjustment of the whole can be arrived at. If you push that note we shall assuredly demand that interest which we have you bound for, and proceed accordingly."

Gruninger replies, two days afterward, by a single letter addressed to the firm :

"Yours of July 5th was received with one also of same date. You write me that the note given by you to me was presented to you by a collector for payment, and you think it a very strange proceeding. I myself can't see anything strange in it. You know that the note ought to have been paid this long time. I am in need of money, and must have it.

"I am sorry to see you mention in your letter about a contract I assigned to you, and you would 'recommend me to withdraw that note as soon as convenient,' etc.; and that if I push that note you shall demand the interest which you say you have me bound for, and proceed accordingly. If you think *this* kind of talk goes with me, you better try it. I am sorry that you have wrote so. And the note I have given to collect must and shall be collected if— I am sorry to answer you in *this* way, but you commenced it."

No arrangement being made, Gruninger sued all three persons as partners on the note.¹ Philpot and Picket pleaded jointly and Sherman separately and alone. The defence was, in substance, that the note was given by them to Gruninger in consideration of the agreement of Gruninger that he would become a member of the proposed oil company, and put certain property in it, and also in consideration of the transfer to them of the well on the Blood Farm; and that he had failed and refused to perform his agreement, and that the well had no value.

Gruninger, on the other hand, asserted that it was given in consideration alone of the transactions of October 19th, 1864, and of an existing debt.

The controversy thus involved was, of course, what the consideration of the note really was.

On the trial the defendants offered in evidence articles of partnership dated November 8th, 1864, and between them, in order to show that the partnership between the three was not in existence when the articles of agreement of October 19th, 1864, were made; but they did not offer or propose to offer any other evidence of the same fact.

The Court rejected the articles.

The plaintiff and defendants each gave evidence tending to show on the one side that the well on the Blood Farm was worth what it cost, on the other that it was worthless.

In charging, after adverting to the various letters already quoted, including that of July 5th by Picket, in the firm's name, in which no objection is taken to the validity of the note, and the cause of its non-payment is stated to be that the firm was then unable to pay it in money, and after adverting to some other evidence the Court said:

"If, in point of fact, the note was given in consideration of past transactions, of obligations already accrued or accruing, then, of course, the defence fails.

"If, on the other hand, the note was given in consideration of the agreement, on the day, May 6th, made by Gruninger, to enter into the company, and also in consideration of the transfer of the said well, and he did not enter into the company, but failed to comply with his agreement, and there was no value in the well, as stated in the plea, then the defence is made out."

The Court, however, said further:

"But it is proper for you to consider whether or not this might have been the state of the case: that there were transactions between the parties; that there was a claim on one side, and which may have arisen, or did arise, in consequence of

¹ See *supra*, p. 1, n. 1.

these transactions. Now, was there a present, existing indebtedness from Philpot and Picket, or from Philpot, Sherman & Co., to Gruninger, and was the execution of this agreement by Gruninger on May 6th simply a motive for the giving of the note and not the consideration of the note? It may be that that was held out as an inducement to the defendants to give the note, as a motive for putting the debt in the shape of a note rather than let it remain in its then present form. If that were so, then the defence would fail, because that proceeds upon the ground, as I understand, that the actual consideration of the giving of the note, not the motive for putting the claim in that form, was the signing of this agreement of May 6th, and the transfer of the well on the Blood Farm.

"It may well happen that A. may owe a valid debt to B., and B. may say to A., 'If you will put the debt in the shape of a note I will do some act for you;' and then, when it is done, the promise to put the debt in that shape is not the consideration of the note, but the debt which is due from one to the other."

The jury found for the plaintiff, and judgment was given accordingly. On exceptions to the portion of the charge last above quoted, and to the rejection of the partnership articles, and on some other matters not necessary in any part to be reported, the case was now here.

S. B. Gookins and J. H. Roberts for the plaintiffs in error.

O. K. Hutchings, contra.

STRONG, J., delivered the opinion of the Court.

That a part of the consideration of the note was the debt due for the oil well which Gruninger had sold six months before to Philpot and Picket, or that the note was intended as an adjustment of that debt, is but faintly denied; but the plaintiffs in error insist that a part at least of the consideration was the agreement of the promisee to contribute to the formation of the proposed company, an agreement which they allege he has failed to perform; and they complain that the jury were misled by an instruction that they might consider whether the signing of the agreement, or the undertaking of Gruninger to put into the company the interests mentioned, was anything more than an inducement to the making of the note by the defendants, furnishing a motive for giving it, but constituting no part of the consideration.

It is, however, not easy to see how the jury could have been misled, to the injury of the plaintiffs in error, by calling attention to a possible distinction between the motive which may have induced giving the note and its consideration, even if no

such distinction can be made. For if it be assumed, as was claimed, that the promisee's undertaking to unite in the formation of a joint-stock company was a part of the consideration, it could not aid the promisors. It would not be a step toward showing that the consideration had failed. Gruninger's neglect or refusal to perform his agreement is not to be confounded with the agreement itself. The latter was the consideration, not its performance. He might be answerable in damages for non-performance, but his undertaking to perform would have been the price of the defendants' promise. That undertaking they still have, and with it the full consideration. Nothing is more common than a promise in consideration of a promise, and the defendants' pleas in this case aver that Gruninger's undertaking was the price of their stipulation. Were it then conceded, as the defendants claimed, the jury would not have been warranted in finding that the consideration of the note had failed.

It is, however, not to be doubted that there is a clear distinction sometimes between the motive that may induce to entering into a contract and the consideration of the contract. Nothing is consideration that is not regarded as such by both parties. It is the price voluntarily paid for a promisor's undertaking. An expectation of results often leads to the formation of a contract, but neither the expectation nor the result is "the cause or meritorious occasion requiring a mutual recompense in fact or in law."¹ Surely a creditor may do a favor to his debtor, or may enter into a new and independent contract with him, induced by which the debtor may assent to giving a note for the previously existing indebtedness. Without the favor or the new contract there is in such a case a full consideration for the note, and the parties may not have contemplated that the favor or the new contract was to be paid for. To regard them as entering into the consideration of the note would be to make a contract for the parties to which their minds never assented.

It is argued that if Sherman did not owe the debt due from Philpot and Picket to Gruninger (as the jury might have found), there was no motive or inducement, much less even consideration, for his becoming a joint promisor in the note, unless it was Gruninger's agreement, and hence it is inferred that the jury were misled in being allowed to consider that agreement as merely a motive or inducement to his assumption. But he was then a partner of Philpot and Picket, and a joint owner with them of the property for which the debt had been contracted. A consideration moving to his copromisors was enough

¹ Dyer, 306b.

to support his promise. The note was given for a smaller sum than the price for which the property had been sold to them. It was accepted as a settlement of the promisee's claim, and a conveyance of the property was made to all the defendants, including Sherman. There was, then, adequate consideration for his promise apart from Gruninger's agreement to put other property into the proposed company. For these reasons, we think, there was no error in the instructions given by the Court to the jury.¹

Judgment is affirmed.

(b) *When consideration necessary.*

PILLANS & ROSE v. VAN MIEROP & HOPKINS.

IN THE KING'S BENCH, APRIL 30, 1765.

[*Reported in 3 Burrow 1663.*]

ON Friday, January 25th last, Attorney-General Norton, on behalf of the plaintiffs, moved for a new trial. He moved it as upon a verdict against evidence, the substance of which evidence was as follows :

One White, a merchant in Ireland, desired to draw upon the plaintiffs, who were merchants at Rotterdam in Holland, for £800 payable to one Clifford ; and proposed to give them credit upon a good house in London for their reimbursement, or any other method of reimbursement.

The plaintiffs, in answer, desired a confirmed credit upon a house of rank in London as the condition of their accepting the bill. White names the house of the defendants as this house of rank, and offers credit upon them. Whereupon the plaintiffs honored the draft and paid the money, and then wrote to the defendants, Van Mierop & Hopkins, merchants in London (to whom White also wrote about the same time), desiring to know " whether they would accept such bills as they, the plaintiffs, should in about a month's time draw upon the said Van Mierop's & Hopkins's house here in London for £800 upon the credit of White ;" and they, having received their assent, accordingly drew upon the defendants. In the interim White failed before their draft came to hand or was even drawn, and the defendants gave notice of it to the plaintiffs and forbid their drawing upon them. Which they nevertheless did, and therefore the defendants refused to pay their bills.

¹ A portion of the opinion has been omitted.—Ed.

On the trial a verdict was found for the defendants.

Upon showing cause, on Monday, February 11th last, it turned upon the several letters that had respectively passed between the plaintiffs and defendants and White. The letters were read. First those from White & Co. in Ireland to the plaintiffs in Holland (by which it appeared that Pillans & Rose had then accepted the bills drawn upon them by White payable to Clifford), then those of the plaintiffs to the defendants, and also White's to the defendants, then those of the defendants to the plaintiffs, agreeing to honor their bill drawn on account of White; the letter from the defendants to the plaintiffs informing them "that White had stopt payment," and desiring them not to draw, as they could not accept their draft, and lastly that which the plaintiffs wrote to the defendants, "That they should draw on them, holding them not to be at liberty to withdraw from their engagement."

Davy and *Wallace* for the defendants. They observed that the plaintiffs had given credit to White above a month before the defendants had agreed to accept their draft, for it appears by White's letter of February 16th, 1762, that Pillans & Rose had then actually accepted Clifford's bills, but Van Mierop & Hopkins did not agree to honor their drafts till March 19th, 1762. Therefore the consideration was past and done before their promise was made, and they argued and principally insisted that for one man to undertake "to pay another man's debt" was a void undertaking, unless there was some consideration for such undertaking, and that a mere general promise, without benefit to the promisor or loss to the promisee, was a *nudum pactum*. And they cited 1 Bulstr. 120; *Thorner v. Field*, Dyer 272 pl. 31; *Hunt v. Bate*, 2 Vern. 224, 225; *Cecil et al. v. Earl of Salisbury*, 1 Ro. Abr. 11, pl. 1, Letter Q. "Consideration executed." Yelv. 40, 41 and 2 Strange, 933; *Hayes v. Warren*, where a past consideration was holden insufficient to raise an *assumpsit*.

Walker and *Dunning* for the plaintiffs. They denied this to be a past consideration, and insisted that the liberty given to the plaintiffs "to draw upon a confirmed house in London" (which was prior to the undertaking by the defendants), was the consideration of the credit given by the plaintiffs to White's drafts, and that this was a good and sufficient consideration for the undertaking made by the defendants. It relates back to the original transaction.

If any one promises to pay for goods delivered to a third person, such promise, being in writing, is a good one. And here White had had £800 from the plaintiffs upon this assur-

ance, and the defendants undertake in writing, in pursuance and completion of this original assurance, to be answerable for White's reimbursing the plaintiffs. And a promise in writing is out of the statute.

This case does not fall within those that have been cited, for Van Mierop & Hopkins have made themselves originally liable. An *ex post facto* event cannot alter the nature of an original promise. Their original promise made them liable and bound them. And they are obliged, both by law and in honor and honesty to perform it.

It is a mercantile transaction, and it must be considered, upon the whole of it, as an admittance "that the defendants either had or soon would have effects of White's in their hands."

LORD MANSFIELD. The objection is "that the letter whereby Van Mierop & Hopkins undertake to honor the plaintiff's bills is *nudum pactum*. The other side deny it.

This is the only question here.

But this is quite different from what passed at the trial; the *nudum pactum*" was not mentioned at that time. The grounds it was argued upon there were: First, that this imported to be a credit given to Pillans & Rose in prospect of a future credit to be given by them to White, and that this credit might well be countermanded before the advancement of any money, and this is so. Secondly, that there was a fraud, for that Van Mierop & Hopkins had reason to think that White had sent goods to Pillans & Rose, whereas this was a mere lending of credit. Thirdly, that if Pillans & Rose had received goods from White, and retained them till he failed the defendant's undertaking was revocable.

I was then of opinion that Van Mierop & Hopkins were bound by their letter unless there was some fraud upon them, for that they had engaged under their hands in a mercantile transaction "to give credit for Pillans & Rose's reimbursement." And I did not see it to be future, as had been objected, nor did I see any fraud; and nothing was then urged about its being *nudum pactum*.

I have no idea that promises "for the debt of another" are applicable to the present case.

This is (as *Walker* said) a mercantile transaction, and it depends upon these letters from merchant to merchant about honoring bills to such an amount, and this credit is given upon a supposition "that the person who is to draw upon the undertakers within a certain time has goods in his hands or will have them." Here Pillans & Rose trusted to this undertaking, and

there is no fraud. Therefore it is quite upon another foundation than that of a naked promise from one "to pay the debt of another."

WILMOT, J. I own the want of consideration at first occurred to me, but I now am satisfied that this case has nothing to do with the cases of undertakings by one "to pay the debt of another." In those cases it is settled "that where the consideration is past the action will not lie," and yet this seems a hard case. The mere promise "to pay the debt of another" without any consideration at all is *nudum pactum*, but the least spark of a consideration will be sufficient. It seems almost implied that there must be some consideration, but if there be none at all it is *nudum pactum*. The statute must mean such a special promise as would have supported an action.

But all this is out of the present case. So also, I think, is all the precedent correspondence.

It lies in a narrow compass.

White, Pillans & Rose, and Van Mierop & Hopkins had all a correspondence together; they have intercourse together mutually in mercantile transactions. Pillans & Rose write to Van Mierop & Hopkins, to know "whether they will honor their drafts for £800 in about a month's time." They say "they will." Now it strikes me (as *Walker* said) that it admits "that they either have assets or effects of White's in their hands," or "that they have credit upon him." Now by this undertaking of a good house in London, and relying upon it, they are deluded and diverted from using any legal diligence to pursue White, or even not to part with any effects of his which they might have in their hands. Therefore this seems to be an irrevocable undertaking by Van Mierop & Hopkins, and they ought to be bound by it. Consequently there ought to be a new trial.

LORD MANSFIELD. A letter of credit may be given as well for money already advanced as for money to be advanced in future.

Let it be argued again the next term, and you shall have the opinion of the whole Court.

Ulterius concilium.

Yesterday this matter accordingly came on again, and was argued by *Wallace* for the defendants, and by the same counsel as argued last term for the plaintiffs.

The latter repeated and enforced their arguments. They said the consideration moved from White to the defendants not from the plaintiffs, Pillans & Rose, to the defendants, and as the defendants have undertaken for White they can't revoke or retract their engagement.

This case is not like the cases cited, some of which are strange cases, and not founded on solid or sufficient reasons, and in others of them there was no meritorious consideration at all. And *Walker* cited *Hardres*, 71 ; *Reynolds v. Prosser*, where the consideration was adjudged sufficient, notwithstanding all the reasoning of Sir Thomas *Hardres* and all the cases cited by him. That was an *assumpsit* by a stranger in consideration that the plaintiff would forbear to prosecute Lord Abergavenny upon a judgment, in the name of the original plaintiff, by virtue of a letter of attorney "to receive it to his own use."

Davy was heard this morning on behalf of the defendants, and urged that the plaintiffs gave credit to White upon his promising to reimburse them, and he said there was a fraudulent concealment of facts.

White's first letter could have no influence on the plaintiffs, for they afterward desired a confirmed credit upon a house of rank in London, so that they did not rely on White's first letter which offered credit on the defendants or any other method of reimbursement. And nothing had then passed between White and the defendants, for the first letter between them was on February 16th (a fortnight after), and then the defendants were deceived into a false opinion "that it was for a future credit and not to secure a past acceptance of White's bills by the plaintiffs." And this concealment of circumstances is sufficient to vitiate the contract. The plaintiffs had accepted a bill of £800 of White's a fortnight before the defendant's letter of February 16th, which bill the plaintiffs had accepted upon assurance of credit on a house in London to reimburse them. And this transaction was fraudulently concealed, both by White and the plaintiffs from the defendants. If this had been disclosed, the defendants would have plainly seen "that the plaintiffs doubted of White's sufficiency" by their requiring further security for his already contracted debt.

All letters of credit relate to future credit, not to debts before incurred ; nor can the advancer of money thereupon include an old debt before incurred.

A bill cannot be accepted before it is drawn. This is only a promise to accept, for it is only a promise "to honor the bill, not a promise to pay it."

A promise "to pay a past debt of another person" is void at common law for want of consideration, unless there be at least an implied promise from the debtee "to forbear suing the original debtor." But here was a debt clearly contracted by White with the plaintiffs on the credit of White, and there is no promise from the plaintiffs "to forbear suing White." A naked

promise is a void promise ; the consideration must be executory, not past or executed.

MANSFIELD, LORD, asked if any case could be found where the undertaking holden to be a *nudum pactum* was in writing.

Davy. It was anciently doubted "whether a written acceptance of a bill of exchange was binding for want of a consideration." It is so said somewhere in Lutwyche.

MANSFIELD, LORD. This is a matter of great consequence to trade and commerce in every light.

If there was any kind of fraud in this transaction the collusion and *mala fides* would have vacated the contract. But from these letters it seems to me clear that there was none. The first proposal from White was "to reimburse the plaintiffs by a remittance or by credit on the house of Van Mierop ;" this was the alternative he proposed. The plaintiffs chose the latter. Both the plaintiffs and White wrote to Van Mierop & Co. They answered "that they would honor the plaintiffs' drafts," so that the defendants assent to the proposal made by White and ratify it. And it does not seem at all that the plaintiffs then doubted of White's sufficiency or meant to conceal anything from the defendants.

If there be no fraud it is a mere question of law. The law of merchants and the law of the land is the same. A witness cannot be admitted to prove the law of merchants. We must consider it as a point of law. A *nudum pactum* does not exist in the usage and law of merchants.

I take it that the ancient notion about the want of consideration was for the sake of evidence only, for when it is reduced into writing, as in covenants, specialties, bonds, etc.,¹ there was no objection to the want of consideration. And the Statute of Frauds proceeded upon the same principle.

In commercial cases among merchants the want of consideration is not an objection.

This is just the same thing as if White had drawn on Van Mierop & Hopkins, payable to the plaintiffs ; it had been nothing to the plaintiffs whether Van Mierop & Co. had effects of White's in their hands or not if they had accepted his bill. And this amounts to the same thing. "I will give the bill due honor" is, in effect, accepting it. If a man agrees "that he will do the formal part," the law looks upon it (in the case of an acceptance of a bill) as if actually done. This is an engagement "to accept the bill if there was a necessity to accept it, and to pay it when due," and they could not afterward retract. It would be very destructive to trade and to trust in commercial

¹ V. *ante*, p. 1639.

dealing if they could. There was nothing of *nudum pactum* mentioned to the jury, nor was it, I dare say, at all in their idea or contemplation.

I think the point of law is with the plaintiffs.

WILMOT, J. The question is "whether this action can be supported upon the breach of this agreement."

I can find none of those cases that go upon its being *nudum pactum* that are in writing; they are all upon parol.

I have traced this matter of the *nudum pactum*, and it is very curious.

He then explained the principle of an agreement being looked upon as a *nudum pactum*, and how the notion of a *nudum pactum* first came into our law. He said it was echoed from the civil law, "*Ex nudo pacto non oritur actio.*" Vinnius gives the reason in lib. 3, tit. De Obligationibus, 4to edition, 596. If by stipulation (and *à fortiori* if by writing) it was good without consideration. There was no radical defect in the contract for want of consideration. But it was made requisite, in order to put people upon attention and reflection, and to prevent obscurity and uncertainty, and in that view either writing or certain formalities were required. *Idem*, on Justinian, 4to edition, 614.

Therefore it was intended as a guard against rash inconsiderate declarations, but if an undertaking was entered into upon deliberation and reflection it had activity, and such promises were binding. Both Grotius and Puffendorff hold them obligatory by the law of nations. Grot., lib. 2, c. 11, De Promissis; Puffend., lib. 3, c. 5. They are morally good, and only require ascertainment. Therefore there is no reason to extend the principle or carry it further.

There would have been no doubt upon the present case according to the Roman law, because here is both stipulation (in the express Roman form) and writing.

Bracton (who wrote¹ temp. Hen. 3) is the first of our lawyers that mentions this. His writings interweave a great many things out of the Roman law. In his third book, cap. 1, De Actionibus, he distinguishes between naked and clothed contracts. He says that "*Obligatio est mater actionis*," and that it may arise *ex contractu, multis modis; sicut ex conventionione, etc., sicut sunt pacta, conventa, quæ nuda sunt aliquando, aliquando vestita, etc.*

Our own lawyers have adopted exactly the same idea as the Roman law. Plowden² 308*b*, in the case of Sheryngton & Pledal v. Strotton and Others, mentions it, and no one con-

¹ *Sub. ultima tempora regis H. 3.*

² This probably was Plowden's *own* argument. I suppose he was himself that apprentice of the Middle Temple who argued for the defendants.

tradicted it. He lays down the distinction between contracts or agreements in words (which are more base) and contracts or agreements in writing (which are more high), and puts the distinction upon the want of deliberation in the former case and the full exercise of it in the latter. His words are the marrow of what the Roman lawyers had said. "Words pass from men lightly," but where the agreement is made by deed there is more stay, etc.; for first there is, etc., and thirdly, he delivers the writing as his deed. "The delivery of the deed is a ceremony in law, signifying fully his good will that the thing in the deed should pass from him who made the deed to the other. And therefore a deed which must necessarily be made upon great thought and deliberation shall bind without regard to the consideration."

The voidness of the consideration is the same in reality in both cases, the reason of adopting the rule was the same in both cases, though there is a difference in the ceremonies required by each law; but no inefficacy arises merely from the naked promise.

Therefore if it stood only upon the naked promise, its being in this case reduced into writing is a sufficient guard against surprise, and therefore the rule of *nudum pactum* does not apply in the present case.

I cannot find that a *nudum pactum* evidenced by writing has been ever holden bad, and I should think it good; though, where it is merely verbal it is bad. Yet I give no opinion upon its being good always when in writing.

Many of the old cases are strange and absurd, so also are some of the modern ones, particularly that of *Hayes v. Warren*.¹

It is now settled "that where the act is done at the request of the person promising, it will be a sufficient foundation to graft the promise upon."

In another instance the strictness has been relaxed; as, for instance,² burying a son or³ curing a son, the considerations were both past and yet holden good. It has been melting down into common sense of late times.

However, I do here see a consideration. If it be a departure from any right, it will be sufficient to graft a verbal promise upon. Now here, White, living in Ireland, writes to the plaintiffs "to honor his draft for £800⁴ payable ten weeks after."

¹ V. 2 Sir J. S. 933. I have a very full note of this case. The reason of the reversal of the judgment was, "That it did not appear by the declaration to be either for the *benefit* or at the *request* of the defendant."

² Church & Church's case; cited in Raym. 260.

³ V. 2 Leon. 111.

⁴ For between Ireland and Holland each usance is one month.

The plaintiffs agree to it on condition that they be made safe at all events. White offers good credit on a house in London, and draws, and the plaintiffs accept his draft. Then White writes to them "to draw on Van Mierop & Hopkins," to whom the plaintiffs write "to inquire if they will honor their draft;" they engage "that they will." This transaction has prevented, stopped, and disabled the plaintiffs from calling upon White for the performance of his engagement, for White's engagement is complied with, so that the plaintiffs could not call upon him for this security. I do not speak of the money, for that was not payable till after two usances and a half. But the plaintiffs were prevented from calling upon White for a performance of his engagement "to give them credit on a good house in London for reimbursement," so that here is a good consideration. The law does not weigh the *quantum* of the consideration. The suspension of the plaintiff's right "to call upon White for a compliance with his engagement" is sufficient to support an action, even if it be a suspension of the right, for a day only, or for ever so little a time.

But to consider this as a commercial case. All nations ought to have their laws conformable to each other in such cases. *Fides servanda est, simplicitas juris gentium prævaleat. Hodierni mores* are such, that the old notion about the *nudum pactum* is not strictly observed as a rule.

On a question of this nature "whether by the law of nations such an engagement as this shall bind" the law is to judge.

The true reason why the acceptance of a bill of exchange shall bind is not on account of the acceptor's having or being supposed to have effects in hand, but for the convenience of trade and commerce. *Fides est servanda*. An acceptance for the honor of the drawer shall bind the acceptor, so shall a verbal acceptance. And whether this be an actual acceptance or an agreement to accept, it ought equally to bind. An agreement "to accept a bill to be drawn in future" would (as it seems to me) by connection and relation bind on account of the antecedent relation. And I see no difference between its being before or after the bill was drawn. Here was an agreement sufficient to bind the defendants to pay the bill; agreeing "to honor it" is agreeing to pay it.

I see no sort of fraud. It rather seems as if the defendants had effects of White's in their hands. And it does not appear to me that the defendants would not have honored the plaintiffs' drafts, even though they had known that it was future credit.

But whether the plaintiffs or the defendants had effects of

White's in their hands or not, we must determine on the general doctrine.

And I am of opinion that there ought to be a new trial.

YATES, J., was of the same opinion. He said it was a case of great consequence to commerce, and therefore he would give both his opinion and his reasons.

The arguments on the side of the defendants terminate in its being a *nudum pactum*, and therefore void.

This depends upon two questions.

First question. "Whether this be a promise without a consideration."

Second question. If it is, then "whether this promise shall not be binding of itself without any consideration."

First. The draft drawn by White on the plaintiffs, payable to Clifford, is no part of the consideration of the undertaking by the defendants. The draft payable to Clifford is never mentioned to the defendants. They are asked "whether they will answer a draft from the plaintiffs upon them;" they answer "they will honor such a draft on them."

Whether the defendants had or had not effects of White's in their hands is immaterial.

Any¹ damage to another or suspension or forbearance of his right is a foundation for an undertaking, and will make it binding, though no actual benefit accrues to the party undertaking.

Now here the promise and undertaking of the defendants did occasion a possibility of loss to the plaintiffs. It is plain that the plaintiffs would not rely on White's assurance only, but wrote to the defendants to know if they would accept their drafts. The credit of the plaintiffs might have been hurt by the refusal of the defendants to accept White's bills. They were or might have been prevented from resorting to him or getting further security from him. It comes within the cases of promises where the debtor forbears suing the original debtor.

Second question. Whether by the law of merchants this contract is not binding on the defendants, though it was without consideration.

The acceptance of a bill of exchange is an obligation to pay it; the end of their institution, their currency, requires that it should be so. On this principle bills of exchange are considered and are declared upon as special contracts, though legally they are only simple contracts; the declaration sets forth the bill and acceptance specifically, and that thereby the defendants by the custom of merchants became liable to pay it.

This agreement "to honor their bill" was a virtual accept-

¹ V. *Coggs v. Bernard*, 2 Ld. Raym. 919.

ance of the bill. An acceptance needs not be upon the bill itself, it may be by collateral writing. *Wilkinson v. Lutwidge*, 1 Strange, 648.

A promise "to accept" is the same as an actual acceptance; and a small matter amounts to an acceptance, and so says Molloy, lib. 2, c. 10, § 20. And an acceptance will bind, though the acceptor has no effects of the drawer in his hands and without any consideration. *Symons v. Parminter*,¹ Hil. 1747, 21 G. 2, B. R. And a bill accepted for the honor of the drawer will also bind.

Then he applied these positions to the present case. It was an acceptance of this very draft by relation and connection, though the bill was not then drawn by the plaintiffs on the defendants.

But even if it did not amount to an actual acceptance, yet it would equally bind the defendants, they would be equally obliged to perform the effect of their undertaking.

The plaintiffs apprised the defendants of their intention to draw, and the defendants promised "to honor their draft," and the plaintiffs of course would regulate their conduct accordingly.

Therefore upon the whole circumstances of this transaction, first, there is a consideration, and secondly, if there was none, yet in this commercial case the defendants would be bound.

ASTON, J. I am of opinion "that there ought to be a new trial."

If there be such a custom of merchants as has been alleged, it may be found by a jury, but it is the Court, not the jury who are to determine the law.

This must be considered as a commercial transaction, and is a plain case. The defendants have undertaken to honor the "plaintiff's draft," therefore they are bound to pay it.

This cannot be called a *nudum pactum*. The answer returned by the defendants is an admission of "having effects of White's in their hands," if that were necessary. And after this promise "to accept" (which is an implied acceptance) they might have applied anything of White's that they had in their hands to this engagement, even though White had drawn other bills upon them in the interim. The defendants voluntarily engaged to the plaintiffs, and they could not recede from their engagement.

As to its being a *nudum pactum* (which matter has been already so well explained) if there be turpitude or illegality in the consideration of a note it will make it void, and may be given in

¹ This was on a motion in arrest of judgment. The judgment was affirmed (*ex parte*) in dom. proc. with £100 costs upon or soon after February 20th, 1748.

evidence, but here nothing of that kind appears nor anything like fraud in the plaintiffs. Here was full notice of all the facts ; a clear apprehension of them by the defendants ; a question put to them "whether they would accept," and their answer "that they would."

Upon the whole he concurred "that an action will lay for the plaintiffs against them, and that the plaintiffs ought to recover."

By the COURT unanimously. The rule "to set aside the verdict and for a new trial" was made absolute.

WILLIAMSON AND WIFE v. LOSH, EXECUTOR.

IN THE KING'S BENCH, MICHAELMAS TERM, 1775.

[*Reported in Chitty on Bills, 9th ed., p. 75, note x.*]

THIS was an action of *assumpsit* against the defendant, as executor of John Losh, deceased, upon the following promissory note :

"I, John Losh, for the love and affection that I have for Jane Tiffin, my wife's sister's daughter, do promise that my executors, administrators, or assigns shall pay to her the sum of £100 of money, one year after my decease, and a caldron and a clock, a wainscot chest, and a bed and bed-clothes, seven pudden-dishes ; as witness my hand this 16th day of February, 1763.

"Witnessed by us, A. B., C. D."

Jane Tiffin afterward intermarried with the plaintiff. Upon the trial a verdict was found for the plaintiff, and a case reserved. The defendant admitted he had proved the will, and had assets sufficient to cover the damages, but contended that there was no consideration in point of law, and that the note could not be recovered upon, and that, as the testator was not bound, the executor was not. The Court held that the instrument being in writing and attested by witnesses, the objection of *nudum pactum* did not lie, and ordered the *postea* to the plaintiff.

RANN *v.* HUGHES.

IN THE HOUSE OF LORDS, MAY 14, 1778.

[*Reported in 7 Term Reports 346, note a.*]

RANN and another, executors of Mary Hughes *v.* Isabella Hughes, Administratrix of J. Hughes in error ; Dom. Proc. The declaration stated that on June 11th, 1764, divers disputes had arisen between the plaintiffs' testator and the defendant's intestate, which they referred to arbitration ; that the arbitrator awarded that the defendant's intestate should pay to the plaintiffs' testator £983. That the defendant's intestate afterward died possessed of effects sufficient to pay that sum ; that administration was granted to the defendant ; that Mary Hughes died, having appointed the plaintiffs her executors ; that at the time of her death the said sum of £983 was unpaid, " by reason of which promises the defendant as administratrix became liable to pay to the plaintiffs as executors the said sum, and being so liable she in consideration thereof undertook and promised to pay," etc. The defendant pleaded *non assumpsit*, *plene administravit*, and *plene administravit*, except as to certain goods, etc., which were not sufficient to pay an outstanding bond debt of the intestate's therein set forth, etc. The replication took issue on all these pleas. Verdict for the plaintiff on the first issue, and for the defendant on the two last ; and on the first a general judgment was entered in B. R. against the defendant *de bonis propriis*. This judgment was reversed in the Exchequer Chamber, and a writ of error was afterward brought in the House of Lords, where after argument the following question was proposed to the judges by the Lord Chancellor, " Whether sufficient matter appeared upon the declaration to warrant after verdict the judgment against the defendant in error in her personal capacity," upon which the Lord Chief Baron Skynner delivered the opinion of the judges to this effect. It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration ; such agreement is *nudum pactum ex quo non oritur actio* ; and whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law. The declaration states that the defendant being indebted as administratrix promised to pay when requested,

and the judgment is against the defendant generally. The being indebted is of itself a sufficient consideration to ground a promise, but the promise must be co-extensive with the consideration unless some particular consideration of fact can be found here to warrant the extension of it against the defendant in her own capacity. If a person indebted in one right in consideration of forbearance for a particular time promise to pay in another right, this convenience will be a sufficient consideration to warrant an action against him or her in the latter right ; but here no sufficient consideration occurs to support this demand against her in her personal capacity, for she derives no advantage or convenience from the promise here made. For if I promise generally to pay upon request what I was liable to pay upon request in another right, I derive no advantage or convenience from this promise, and therefore there is not sufficient consideration for it. But it is said that if this promise is in writing that takes away the necessity of consideration and obviates the objection of *nudum pactum*, for that cannot be where the promise is put in writing ; and that after verdict, if it were necessary to support the promise that it should be in writing, it will after verdict be presumed that it was in writing, and this last is certainly true ; but that there cannot be *nudum pactum* in writing, whatever may be the rule of the civil law, there is certainly none such in the law of England. His Lordship observed upon the doctrine of *nudum pactum* delivered by Wilmot, J., in the case of Pillans v. Van Mierop and Hopkins, 3 Burr. 1663, that he contradicted himself, and was also contradicted by Vinnius in his Comment on Justinian.

All contracts are by the laws of England distinguished into agreements by specialty and agreements by parol, nor is there any such third class as some of the counsel have endeavored to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved. But it is said that the Statute of Frauds has taken away the necessity of any consideration in this case. The Statute of Frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable. His Lordship here read those sections of that Statute which relate to the present subject. He observed that the words were merely negative, and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought or some memorandum thereof was in writing and signed by the party. But this does not prove that the agreement was still not liable to be tried and judged of as all

other agreements merely in writing are by the common law, and does not prove the converse of the proposition that when in writing the party must be at all events liable. He here observed upon the case of *Pillans v. Van Mierop* in Burr., and the case of *Losh v. Williamson*, Mich. 16 G. 3 in B. R., and so far as these cases went on the doctrine of *nudum pactum*, he seemed to intimate that they were erroneous. He said that all his brothers concurred with him that in this case there was not a sufficient consideration to support this demand as a personal demand against the defendant, and that it being now supposed to have been in writing makes no difference. The consequence of which is that the question put to us must be answered in the negative.

And the judgment in the Exchequer Chamber was affirmed.

(c) *Surrender of right as a consideration.*

SMITH AND SMITH'S CASE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1583.

[*Reported in 3 Leonard 88.*]

LAMBERT SMITH, executor of Thomas Smith, brought an action upon the case against John Smith, that whereas the testator having divers children infants, and lying sick of a mortal sickness, being careful to provide for his said children infants; the defendant in consideration the testator would commit the education of his children, and the disposition of his goods after his death during the minority of his said children, for the education of the said children to him, promised to the testator to procure the assurance of certain customary lands to one of the children of the said testator; and declared further that the testator thereupon constituted the defendant overseer of his will, and ordained and appointed by his will that his goods should be in the disposition of the defendant, and that the testator died, and that by reason of that will the goods of the testator to such a value came to the defendant's hands to his great profit and advantage. And upon *non assumpsit* pleaded, it was found for the plaintiff; and upon exception to the declaration in arrest of judgment for want of sufficient consideration it was said by

Wray, C.J., that here is not any benefit to the defendant that should be a consideration in law to induce him to make this promise, for the consideration is no other but to have the disposition of the goods of the testator *pro educatione liberorum*; for all the disposition is for the profit of the children, and notwithstanding that such overseers commonly make gain of such disposition, yet the same is against the intendment of the law, which presumes every man to be true and faithful if the contrary be not showed; and therefore the law shall intend that the defendant hath not made any private gain to himself, but that he hath disposed of the goods of the testator to the use and benefit of his children according to the trust reposed in him. Which Ayliffe, J., granted. Gawdy, J., was of the contrary opinion. And afterward by award of the Court it was that the plaintiff *nihil capiat per billam*.¹

FULLER'S CASE.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1586.

[*Reported in Godbolt 94.*]

A. PROMISES unto the eldest son that if he will give his consent that his father shall make an assurance unto him of his lands, that he will give him £10. If he give his assent, although no assurance be made, yet he shall maintain an action upon the promise. But at another day Periam, J., said that in that case the son ought to promise to give his assent, or otherwise A. had nothing if his son would not give his consent. And so where each hath remedy against the other it is a good consideration. In Hillary Term after Fenner spake in arrest of judgment upon the special verdict, that because that the *assumpsit* is but of one part, and the other is at liberty, whether he will give his consent or not; that therefore although that he do consent that he shall not recover the £10. Also he said that the promise was that if he would give consent that his father should make assurance to him, and here the assurance is made to A. to the use of the defendant and his wife in tail, so as it varies from the first

¹ One of the most striking differences between debt and *assumpsit* in respect of consideration is, that in debt the consideration must inure to the benefit of the debtor, while in *assumpsit* it may inure to the benefit of the promisor, or of some third person, or to the benefit of no one. It was only by degrees, however, that this difference between debt and *assumpsit* was developed.—Langdell, Summary of the Law of Contracts, 80.—ED.

communication and also it is in tail. Shuttleworth contrary ; inasmuch as he hath performed it by the giving of consent, then when he hath performed. It is not to the purpose that he was not tied by a cross *assumpsit* to do it, but if he had not given his consent he should have nothing. At length judgment was given for the plaintiff. And Periam, J., said in this case that if a covenant be to make an estate to A. and it is made to B. to the use of A. that he doubted whether that were good or not.

SIR ANTHONY STURLYN *v.* ALBANY.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1587.

[*Reported in Croke, Elizabeth, 67.*]

ASSUMPSIT. The case was, the plaintiff had made a lease to J. S. of land for life rendering rent. J. S. grants all his estate to the defendant ; the rent was behind for divers years ; the plaintiff demands the rent of the defendant, who assumed that if the plaintiff could show to him a deed that the rent was due, that he would pay to him the rent and the arrearages ; the plaintiff alleged that upon such a day of, etc., at Warwick, he showed unto him the indenture of lease, by which the rent was due, and notwithstanding he had not paid him the rent and the arrearages due for four years. Upon *non assumpsit* pleaded it was found for the plaintiff, and damages assessed to so much as the rent and arrearages did amount unto. And it was moved in arrest of judgment, that there was no consideration to ground an action, for it is but the showing of the deed, which is no consideration. 2. The damages ought only to be assessed for the time the rent was behind, and not for the rent and the arrearages, for he hath other remedy for the rent ; and a recovery in this action shall be no bar in another action. But it was adjudged for the plaintiff, for when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action, and here the showing of the deed is a cause to avoid suit,¹ and the rent and arrearages may be assessed

¹ It appears to me that it has not been always sufficiently borne in mind that the same thing may be a consideration or not, as it is dealt with by the parties. . . .

. . . It is hard to see the propriety of erecting any detriment which an instrument may disclose or provide for into a consideration, unless the parties

all in damages ; but they took order that the plaintiff should release to the defendant all the arrearages of rent before execution should be awarded. *Nota.* In this case it was alleged that it hath been adjudged, when one assumeth to another, that if he can show him an obligation in which he was bound to him, that he would pay him, and he did show the obligation, etc., that no action lieth upon this *assumpsit* ; which was affirmed by the justices.¹

PICKAS v. GUILLE.

IN THE KING'S BENCH, TRINITY TERM, 1608.

[*Reported in Yelverton 128.*]

THE plaintiff declared that the defendant in consideration the plaintiff *adtunc ed ibidem* at the defendant's request *deliberavit* to the defendant four broad cloths, and two packs and a half of wool of the plaintiff's to the value £50 promised the same broad cloths and packs of wool to the plaintiff upon request to redeliver. The plaintiff said *in facto* that he did deliver them to the defendant, yet the defendant had not, although he was such a day, etc., requested, redelivered them, and on *non assumpsit* pleaded, it was found for the plaintiff ; and Yelverton showed in arrest of judgment that there is no consideration laid in the declaration to draw a promise from the defendant, for the defendant had no benefit by the cloths, etc., but *nudam custod.* which is rather a charge than a benefit ; for the defendant could not use them, and therefore it is to be resembled to 9 E. 4, where delivery of the evidences to the true owner is no consideration, for the owner ought to have them of common right. *Quod fuit concessum per totam curiam.* And *nil capiat per billam* entered.

have dealt with it on that footing. In many cases a promisee may incur a detriment without thereby furnishing a consideration. The detriment may be nothing but a condition precedent to the performance of the promise, as where a man promises to pay another \$500 if he breaks his leg. Byles, J., in *Shadwell v. Shadwell*, 30 L. J. C. P. 145, 149. The courts, however, have gone far toward obliterating this distinction.—Holmes, *The Common Law*, 292.—ED.

¹ It was agreed by all the justices that if one be bound in an obligation, and afterward promise to pay the money, *assumpsit* lieth upon this promise ; and if he recover all in damages, this shall be a bar in debt upon the obligation. *Ashbrooke v. Snape*, 1 Cro. Eliz. 240.—ED.

WHEATLEY v. LOW.

IN THE KING'S BENCH, HILARY TERM, 1623.

[Reported in Croke, James, 668.]

ACTION on the case. Whereas he was obliged to J. S. in £40 for the payment of £20, and the bond being forfeited, he delivered £10 to the defendant to the intent he should pay it to J. S. in part of payment *sine ullâ morâ*; that *in consideratione inde* the defendant assumed, etc., and assigns for breach, that he had not paid, whereupon the other had sued him for this debt, etc.

The defendant pleaded *non assumpsit*, and verdict for the plaintiff.

It was moved in arrest of judgment that this is not any consideration, because it is not alleged that he delivered it to the defendant upon his request, and the acceptance of it to deliver to another *sine morâ* cannot be any benefit to the defendant to charge him with this promise.

Sed non allocatur, for being that he accepted this money to deliver, and promised to deliver it, it is a good consideration to charge him. Wherefore it was adjudged for the plaintiff. A writ of error being brought, and this matter only assigned for error, the judgment was affirmed.

HAWES v. SMITH.

IN THE KING'S BENCH, HILLARY TERM, 1675.

[Reported in 2 Levinz 122.]

ERROR of a judgment in *assumpsit in com. banco* against the defendant, an executor, wherein the plaintiff declared that whereas the testator was indebted to him, the defendant assumed in consideration the plaintiff at his request had accounted with him, and was found so much in arrear, to pay it. The plaintiff had judgment in *com. banco de bonis propriis* of the executor, and this was assigned for error, but overruled as no error, for the plaintiff was not bound to account with the executor, and yet he did account at the request of the executor. *Et per Hale*, though a bare account will not oblige an executor to pay *de bonis propriis*, yet a promise in consideration of forbearance will;

and the case is all one, for it must be intended that an express request was made to account, and thereupon an express promise to pay, otherwise the evidence would not support the declaration ; whereupon judgment was affirmed *per totam curiam*.

WILLIAMSON v. CLEMENTS.

IN THE COMMON PLEAS, APRIL 25, 1809.

[*Reported in 1 Taunton 523.*]

THE plaintiff declared that the defendant was indebted to him in £39 15s. 2d. by virtue of a bill of exchange drawn by the defendant, payable to his own order, and indorsed to the plaintiff, but which bill the plaintiff was then unable to produce or deliver up to the defendant ; and thereupon, in consideration of the premises, and that the plaintiff at the defendant's request had executed to him a bond, conditioned for indemnifying the defendant against his afterward being compelled to pay the said sum of money, and purporting to acknowledge its having been paid by the defendant to the plaintiff (although the same had not been actually so paid), the defendant undertook to pay the plaintiff the said sum of money upon request. After verdict for the plaintiff upon this count, *Best* had obtained a rule *nisi* for arresting the judgment, on the ground that no consideration was stated for the defendant's promise.

Shepherd now showed cause. The plaintiff has by this bond given the defendant a complete acquittance and discharge for his bill, for he has not only estopped himself from ever bringing any action upon the bill which was lost, so that the bill, as between them, is gone, and he could recover the sum due only upon the defendant's promise ; but also, if a third person had recovered against the defendant on the bill, the plaintiff on this bond would be bound to repay him. It is a detriment to the plaintiff to relinquish his remedy on the bill, and the subjecting himself to a detriment at the defendant's request is a sufficient consideration ; it is not necessary that any benefit should result to the defendant. By the St. 9 & 10 W. 3, c. 17, § 3 upon the loss of this bill the defendant was bound to give the plaintiff another of the same tenor, taking an indemnity against the former ; and the plaintiff in fact accepts this promise in lieu of another bill, though he has not so stated it in his count. In 1 Ro. Ab. 22, pl. 21 it was held that the giving up the posses-

sion of bills of exchange was a good consideration, though they were given up at the request of one who was a stranger to the bills, and could never avail himself of them ; because it was a detriment to the plaintiff to part with them. So in an anonymous case, 1 Sid. 31 a son promised J. S. in consideration that he would deliver up the bond of his deceased father, and make him, the son, a discharge of the debt, he would pay him £100 ; and it was objected that it did not appear that the son was liable to this debt ; but it was answered that it should be intended that the discharge was made to the party entitled to it, and so a good consideration ; but at all events it was a detriment to the plaintiff to deliver up the bond.

Best, contra. The plaintiff has all the advantage in this transaction, and the defendant none. It is sufficient for the defendant that it does not appear on this count that he was ever liable to pay this bill. By law a drawer is discharged if he has not notice of the dishonor of a bill, and no notice is here averred. It does not appear on this count but that the plaintiff might have negotiated the bill. The defendant could in no case have been liable for more than the amount of the bill ; to that extent he is still liable, therefore he is not benefited. In the case cited the bills were delivered at the defendant's request ; the nature of this transaction proves that this contract was entered into at the instance of the plaintiff, for it is in no respect either beneficial to the defendant or prejudicial to the plaintiff, for whose convenience only it took place.

MANSFIELD, C.J. The count states that before and at the time of the promises the defendant was indebted to the plaintiff ; that fact, therefore, must have been proved at the trial ; but if he had been discharged for want of notice of the bill's dishonor, or if the plaintiff had negotiated the bill, the defendant could not have been found then indebted to the plaintiff. It therefore must be taken that he was bound in law to pay the bill. The count then states that in consideration that the plaintiff, being unable to deliver up the bill, had given a bond of indemnity and discharge, the defendant promised to pay. What then is it more or less than this : The defendant was indebted to the plaintiff on a bill of exchange, which was not then negotiated ; the time of payment was arrived, for the money is stated to be then due. The bill could not afterward pass into other hands with better rights than the plaintiff had ; it must pass subject to all the equities which the defendant had on it. The agreement is entirely to discharge the defendant from payment of the bill on his engaging in a different way to pay the money therein mentioned. Is not this a sufficient consideration ?

HEATH, J., concurred.

LAWRENCE, J. The argument goes on a supposition which the count does not warrant ; that all is done at the instance of the plaintiff ; now the count states that the request comes from the defendant. I will give the defendant credit to suppose him an honest man, and that being told the bill is lost, he had said, " Give me a bond of indemnity, and I will give you another bill." This is just as natural as if the plaintiff had found him unwilling to do this and had requested it. It is a disadvantage to the plaintiff to execute the bond if it is no advantage to the defendant. There is a case in 1 Sid. 57, *Traver v. —*, where a woman, after the decease of her husband, promised a creditor that if he would prove her husband had owed him £20, she would pay it ; and it was held a good consideration, because it was trouble and charge to the creditor to prove his debt.

CHAMBRE, J., concurring.

The rule was discharged.

BROOKS v. BALL.

IN THE SUPREME COURT OF NEW YORK, OCTOBER TERM, 1820.

[*Reported in 18 Johnson 337.*]

IN error, to the Court of Common Pleas of Orange County. Ball brought an action of *assumpsit* against Brooks, in the Court below. The declaration contained a special count, stating that the plaintiff claimed of the defendant the sum of \$100, which the defendant denied that he owed to the plaintiff, but promised that if the plaintiff would make oath to the correctness of his claim, he, the defendant, would pay the amount thereof ; and averred that the plaintiff did make oath to the truth and correctness of his claim, but that the defendant, notwithstanding his promise, refused to pay the \$100, etc. The declaration also contained the common money counts. The defendant pleaded the general issue.

After the plaintiff's counsel had stated his case, the defendant's counsel insisted that admitting the facts stated to be proved, they were not sufficient to support the action, because the promise of the defendant was without consideration and void, and the plaintiff could not lawfully support his claim on his own affidavit. He, therefore, moved that the plaintiff should be nonsuited, but the objection was overruled by the

Court. The plaintiff then went into the evidence in support of his case. It was proved that the defendant made the promise alleged ; that the plaintiff had made the affidavit and demanded payment of the \$100 ; and that the defendant had admitted his liability to pay the money, and intended to pay, but was advised to the contrary.

The defendant's counsel then offered to prove that the plaintiff, in his affidavit, had sworn falsely, or was grossly mistaken. This evidence was objected to and overruled by the Court. And the counsel for the defendant tendered a bill of exceptions. The jury, under the direction of the Court, found a verdict for the plaintiff for \$110.50.

Wisner for the plaintiff in error. This case is distinguishable from the cases which are to be found in the books. They will be found to be cases where the defendant promised to pay a precedent debt, if the plaintiff would prove it by a third person. Here the debt was to be created by the promise to pay, on the oath of the plaintiff himself. It is against the fundamental principle of law that a party should be a judge in his own cause or give evidence in his own favor.

If such a promise can be a foundation for an action, it is at most *prima facie* evidence, and may be rebutted by showing that the plaintiff swore falsely or was mistaken. (2 Comyn on Contracts, 449, 450.)

Betts, contra. In *Knight v. Rushwood* (Cro. Eliz. 469) the defendant promised that if the plaintiff and two witnesses would depose before the Mayor of Lincoln, as to a bond of a third person, the defendant would pay it. *Bretton v. Prettiman* (T. Raym. 153) is precisely in point to show that this action may be maintained. The defendant promised that in consideration that the plaintiff would take an oath that money was due to him, he would pay it ; and the plaintiff took an oath before a master in chancery, and brought *assumpsit* for the money and recovered. (S. C. 1 Sid. 283 ; 2 Keble, 44.) In *Stevens v. Thacker* (Peake's N. P. Cases, 187, 188) the holder of a bill of exchange promised not to sue the acceptor if he would make affidavit that the acceptance was a forgery. The affidavit was drawn, but the defendant did not swear to it. Lord Kenyon said that if the defendant had sworn to the affidavit he should have held that he had discharged himself from the action, though the affidavit had been false. (1 Mod. 166 ; *Lloyd v. Willan* ; 1 Esp. N. P. Cases, 178, 179 ; *Delesline v. Greenland*, 1 Bay's S. C. Rep. 458, S. P.) One promise is a sufficient consideration for another promise. (8 Johns. Rep. 306.)

SPENCER, C.J., delivered the opinion of the Court. The

principal question presented by this case is, whether a promise to pay a sum claimed to be due by one party and denied by the other, if the party claiming would swear to the correctness of the claim, and he does so swear, is a valid promise. Another question was made on the trial, whether it was competent to the defendant below to prove that the plaintiff below either swore falsely or was grossly mistaken in the affidavit which he made.

It has been frequently decided that a promise to pay money, in consideration that the plaintiff would take an oath that it was due, was a valid and binding promise. Thus in *Bretton v. Prettiman* (T. Raym. 153) the plaintiff declared that the defendant promised, in consideration that the plaintiff would take an oath that money was due to him, he would pay him, and the plaintiff averred that he swore before a master in chancery. On demurrer it was adjudged for the plaintiff, and, as the reporter states, because it was not such an oath for which he may be indicted. In *Anin & Andrews* (1 Mod. 166) there was a promise to pay, if the plaintiff would bring two witnesses before a justice of the peace, who should depose that the defendant's father was indebted to the plaintiff; and two judges against one thought it not a profane oath, because it tended to the determining a controversy, and the plaintiff had judgment. This case occurred before the Statute of Frauds; the promise would now be holden to be void unless in writing, it being to pay the debt of a third person. The case of *Bretton v. Prettiman* is differently stated in 1 Sid. 283 and 2 Keb. 26, 44. It is there stated to be a promise to pay, if the plaintiff would procure a third person to make oath that the money was due. But this makes no difference in principle, for in either case the oath was extra-judicial.

In *Stevens and Others v. Thacker* (Peake's N. P. Rep. 187) the defendant was sued as the acceptor of a bill, and alleged it to be a forgery, and offered to make affidavit that he never had accepted it. The plaintiff agreed not to sue the defendant if he would make the affidavit. The affidavit was drawn, but not sworn to. Lord Kenyon said that had the defendant sworn to the affidavit, he should have held that he had discharged himself, though the affidavit had been false; for the plaintiffs who had agreed to accept that affidavit, as evidence of the fact, should not, after having induced the defendant to commit the crime of perjury maintain an action on the bill. In *Lloyd v. Willan* (1 Esp. Rep. 178) the defendant's attorney proposed to the plaintiff's attorney that the defendant should pay the demand, if the plaintiff's porter would make an affidavit that

he had delivered the goods in question to the defendant. The affidavit was made, and Lord Kenyon held it to be conclusive, and that the defendant was precluded from going into any defence in the case.

These cases, which stand uncontradicted, abundantly show that such a promise as the present is good in point of law, and that the making the proof or affidavit, whether by a third person or by the party himself, is a sufficient consideration for the promise. It is not making a man a judge in his own cause, but it is referring a disputed fact to the conscience of the party. It is begging the question to suppose that it will lead to perjury. If the promise is binding, because the making the proof or affidavit is a consideration for it, the defendant must necessarily be precluded from gainsaying the fact. He voluntarily waives all other proof ; and to allow him to draw in question the verity or correctness of the proof or affidavit would be allowing him to alter the conditions of his engagement and virtually to rescind his promise.

Judgment affirmed.

WILKINSON v. OLIVEIRA.

IN THE COMMON PLEAS, JANUARY 27, 1835.

[*Reported in 1 Bingham, New Cases, 490.*]

THE declaration stated that divers disputes and controversies had arisen between the defendant and divers other persons, respecting the disposition of the estate and effects of one Dominick Oliveira, then late deceased, and the right of the defendant to the possession of any and what part thereof ; in which disputes and controversies it became and was necessary, for the termination thereof in favor of the defendant, that the defendant should prove that the said Dominick Oliveira was, at the time he made his will, and at the time of his death, an alien, and a native of Portugal ; that the plaintiff was lawfully possessed of a certain writing and paper, being a letter written by the said Dominick Oliveira, in his lifetime, to the plaintiff, which said letter showed, declared, and proved that the said Dominick Oliveira was, at the time he made his will, and at the time of his death, an alien and a native of Portugal ; that the plaintiff, at the request of the defendant, gave to the defendant the said letter, to be used and employed by the defendant for the purpose of proving that the said Dominick Oliveira was such alien and native

of Portugal at the time he made his will and at the time of his death ; that the defendant used and employed the said letter for the said purpose ; and that, by means of the said letter and of the matters therein contained, the defendant was enabled to, and did cause the said disputes and controversies to be determined in favor of him, the defendant, and did, by means of the said letter and of the matters therein contained, become lawfully possessed of and acquired a large portion of the estate and effects of the said Dominick Oliveira, of great value, to wit, of the value of £100,000, etc. And thereupon, to wit, on, etc., at, etc., in consideration thereof, and that the plaintiff, at the special instance and request of the defendant, had then and there given the said letter to the defendant, the defendant then and there undertook and faithfully promised the plaintiff to give him, the plaintiff, a certain sum of money, to wit, the sum of £1000.

Breach—refusal to give the £1000 in conformity with the promise.

Plea, that the defendant was not by means of the letter enabled to, and did not by means thereof cause the said disputes to be determined in favor of the defendant, and that the defendant did not, by means of the letter, become possessed of a portion of the estate of Dominick Oliveira of the value of £100,000.

Demurrer—for putting in issue matter not properly issuable, and for not denying or confessing and avoiding the breach of promise. Joinder.

Kelly, for the plaintiff, was called upon by the Court to support the declaration. The consideration, though past, is alleged to have arisen at the defendant's request, which renders it sufficient to impart validity to the defendant's promise ; and though the letter in question is alleged to have been *given* to the defendant, the statement amounts to this, that, in consideration that the plaintiff had put the defendant in possession of a document by which the defendant was enabled to recover £100,000, the defendant undertook to give the plaintiff in return £1000. For such an undertaking the delivery of the document was ample consideration.

Talfourd, contra, contended that, taking the whole declaration together, it appeared plainly the letter had been handed to the defendant by way of a spontaneous gift, and such a gift was no consideration for a promise to pay.

TINDAL, C.J. What would you say to the case of a man who, entering a shop, should say, I'll give £10 for such an article. Here the word *give* is used on both sides. It is a gift upon a mutual consideration.

Per CURIAM. There must be judgment for the plaintiff.

BAINBRIDGE v. FIRMSTONE.

IN THE QUEEN'S BENCH, NOVEMBER 2, 1838.

[Reported in 8 *Adolphus & Ellis* 743.]

ASSUMPSIT. The declaration stated that, whereas heretofore, to wit, etc., in consideration that plaintiff, at the request of defendant, had then consented to allow defendant to weigh divers, to wit, two, boilers, of the plaintiff, of great value, etc., defendant promised that he would, within a reasonable time after the said weighing was effected, leave and give up the boilers in as perfect and complete a condition and as fit for use by plaintiff as the same were in at the time of the consent so given by plaintiff; and that, although in pursuance of the consent so given, defendant, to wit, on, etc., did weigh the same boilers, yet defendant did not nor would, within a reasonable time after the said weighing was effected, leave and give up the boilers in as perfect, etc., but wholly neglected and refused so to do, although a reasonable time for that purpose had elapsed before the commencement of this suit; and, on the contrary thereof, defendant afterward, to wit, on, etc., took the said boilers to pieces, and did not put the same together again, but left the same in a detached and divided condition, and in many different pieces, whereby plaintiff hath been put to great trouble, etc. Plea, *non assumpsit*.

On the trial before Lord Denman, C.J., at the London sittings after last Trinity Term a verdict was found for the defendant.

John Bayley now moved in arrest of judgment. The declaration shows no consideration. There should have been either detriment to the plaintiff or benefit to the defendant. 1 Selwyn's N. P. 45.¹ It does not appear that the defendant was to receive any remuneration. Besides the word "weigh" is ambiguous.

LORD DENMAN, C.J. It seems to me that the declaration is well enough. The defendant had some reason for wishing to weigh the boilers, and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition. We need not inquire what benefit he expected to derive. The plaintiff might have given or refused leave.

PATTESON, J. The consideration is, that the plaintiff, at the defendant's request, had consented to allow the defendant to

¹ 9th ed.

weigh the boilers. I suppose the defendant thought he had some benefit; at any rate, there is a detriment to the plaintiff from his parting with the possession for even so short a time.

WILLIAMS and COLERIDGE, JJ., concurred.

Rule refused.

BROOKS v. HAIGH AND ANOTHER.

IN THE EXCHEQUER CHAMBER, JUNE 29, 1840.

[Reported in 10 *Adolphus & Ellis* 323.]

THE writ of error set out the pleadings, of which the material part is stated in the preceding report. The errors assigned were that the declaration is insufficient, and that the judgment was for the plaintiffs below, whereas it ought to have been for the defendant. The writ of error was argued in Trinity vacation (June 22d) 1840, before Lord Abinger, C.B., Bosanquet, Coltman, and Maule, JJ., and Alderson and Rolfe, BB.

J. Campbell for the plaintiff in error.

W. W. Follett, contra.

LORD ABINGER, C.B., in the same vacation (June 29th) delivered the judgment of the Court.

In the case of *Brooks v. Haigh* the judgment of the Court is, to affirm the judgment of the Court of Queen's Bench.¹

¹ The case before the Queen's Bench is reported as follows in 10 A. & E., 309:

Assumpsit. The first count of the declaration stated that heretofore, to wit, on, etc., "in consideration that the said plaintiffs, at the special instance and request of the said defendant, would give up to him a certain guarantee of £10,000 on behalf of Messrs. John Lees & Son, Manchester, then held by the said plaintiffs, he, the said defendant, undertook, and then faithfully promised the said plaintiffs to see certain bills, accepted by the said Messrs. John Lees & Sons, paid at maturity—that is to say, a certain bill of exchange" bearing date, etc., drawn by plaintiffs upon and accepted by the said Lees & Sons, payable three months after date, for £3466 13s. 7d., and made payable at, etc.; and also a certain other bill, etc., describing two other bills for £3000 and £3200 drawn by plaintiffs upon and accepted by Lees & Sons, and made payable at, etc. Averment, that plaintiffs, relying on defendant's said promise, did then, to wit, on, etc., "give up to the said defendant the said guarantee of £10,000." Breach, non payment of the bills, when they afterward came to maturity by Lees & Sons, or the parties at whose houses the bills respectively were made payable or by defendant or any other person, etc.

Third plea to the first count. "That the said supposed guarantee of £10,000, in consideration of the giving up whereof the defendant made such supposed promise and undertaking as therein mentioned, and which

It is the opinion of all the Court that there was in the guarantee an ambiguity that might be explained by evidence, so as to make it a valid contract, and, therefore this was a sufficient consideration for the promise declared upon.

guarantee was so given up to the said defendant as therein mentioned, was a special promise to answer the said plaintiffs for the debt and default of other persons, to wit, the said Messrs. John Lees & Sons in the said first count mentioned; and that no agreement in respect of, or relating to, the said supposed guarantee or special promise, or any memorandum or note thereof, wherein any sufficient consideration for the said guarantee or special promise was stated or shown, was in writing and signed by the said defendant, or any other person by him thereunto lawfully authorized. And the said defendant further saith that the said supposed guarantee, in consideration of the giving up whereof the defendant made the said supposed promise and undertaking in the said first count mentioned, and which was so given up as therein mentioned, was and is contained in a certain memorandum in writing signed by the defendant, and which was and is in the words and figures and to the effect following—that is to say :

“ ‘ MANCHESTER, February 4, 1837.

“ ‘ MESSRS. HAIGH & FRANCEYS :

“ ‘ GENTLEMEN : In consideration of your being in advance to Messrs. John Lees & Sons in the sum of £10,000 for the purchase of cotton, I do hereby give you my guarantee for that amount (say, £10,000) on their behalf.

“ ‘ JOHN BROOKS.’

“ And that there was no other agreement or memorandum or note thereof, in respect of, or relating to, the said last-mentioned supposed guarantee or special promise; wherefore the said defendant says that the supposed guarantee, in consideration whereof the said defendant made the said supposed promise and undertaking in the said first count mentioned, was and is void and of no effect; and therefore that the said supposed promise and undertaking in the said first count mentioned was and is void and of no effect.” Verification.

Demurrer, assigning for cause, “ that it is admitted by the plea that the memorandum, the giving up of which was the consideration of the guarantee in the said declaration mentioned, was actually given up to the said defendant by the said plaintiffs, and the consideration was therefore executed by the said defendant, and that, even if the original memorandum was not binding in point of law, the giving up was a sufficient consideration for the promise in the declaration mentioned.” Joinder.

The demurrer was argued in last Hilary term.*

W. W. Follett for the plaintiff.

J. Campbell, contra.

LORD DENMAN, C.J., in this term (June 6th) delivered the judgment of the Court.

This action was brought upon an *assumpsit* to see certain acceptances paid, in consideration of the plaintiffs giving up a guarantee of £10,000 due from the acceptor to the plaintiffs. Plea, that the guarantee was for the debt of another, and that there was no writing wherein the considera-

* January 18th. Before Lord Denman, C.J., Littledale, Williams, and Coleridge, JJ.

It is also the opinion of all the Court, with the exception of my Brother Maule, who entertained some doubt on the question, that the words both of the declaration and the plea import that the paper on which the guarantee was written was given

tion appeared, signed by the defendant, and so the giving it up was no good consideration for the promise. Demurrer, stating for cause that the plea is bad, because the consideration was executed, whether the guarantee were binding in law or not. The form of the guarantee was set out in the plea.

"In *consideration of your being in advance* to Messrs. John Lees & Sons, in the sum of £10,000 for the purchase of cotton, I do hereby give you my guarantee for that amount (say, £10,000), on their behalf.

"JOHN BROOKS."

It was argued for the defendant that this guarantee is of no force, because the fact of the plaintiffs being already in advance to Lees could form no consideration for the defendant's promise to guarantee to the plaintiffs the payment of Lees's acceptances. In the first place, this is by no means clear. That "being in advance" must necessarily mean to assert that he was in advance at the time of giving the guarantee, is an assertion open to argument. It may possibly have been intended as prospective. If the phrase had been "in consideration of your *becoming* in advance," or "*on condition* of your being in advance," such would have been the clear import.* As it is, nobody can doubt that the defendant took a great interest in the affairs of Messrs. Lees, or believe that the plaintiffs had not come under the advance mentioned at the defendant's request. Here is then sufficient doubt to make it worth the defendant's while to possess himself of the guarantee; and if that be so, we have no concern with the adequacy or inadequacy of the price paid or promised for it.

But we are by no means prepared to say that any circumstances short of the imputation of fraud in fact could entitle us to hold that a party was not bound by a promise made upon *any consideration* which could be valuable, while of its being so the promise by which it was obtained from the holder of it must always afford some proof.

Here, whether or not the guarantee could have been available within the doctrine of *Wain v. Warlters*,† the plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise. Both being free and able to judge for themselves, how can the defendant be justified in breaking this promise, by discovering afterward that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded. He may have had other objects and motives, and of their weight he was the only judge. We therefore think the plea bad, and the demurrer must prevail.

Judgment for the plaintiffs.

There was also, in this case, an issue of fact, raising the question whether or not the plaintiffs had given up the original guarantee. On this issue the parties went to trial at the Liverpool spring assizes, 1839, before Alderson, B.

* See the discussion on the words "for giving his vote," in *Lord Huntingtower v. Gardiner*, 1 B. & C. 297.

† 5 East, 10.

up, and that the actual surrender of the possession of the paper to the defendant was a sufficient consideration without reference to its contents.

Judgment affirmed.

The plaintiffs called on the defendant to produce the guarantee. On production it appeared to be unstamped, and Cresswell, for the defendant, therefore objected to its being read. Alderson, B., admitted it, and the plaintiffs had a verdict. Cresswell moved for a new trial in the ensuing term on account of the admission of that evidence, and he cited *Jardine v. Paine*.^{*} Patteson, J., mentioned *Coppock v. Bower*[†] and *Wallis v. Broadbent*.[‡] The rule was afterward made absolute by consent. The cause was tried again at the Liverpool spring assizes, 1840, before Erskine, J. The guarantee was not produced, having been destroyed since the last trial; but the learned judge (assuming it not to have been stamped) allowed evidence to be given of its contents; and on this ground Cresswell, in the ensuing Easter Term, moved for a new trial.[§] He referred to *Crisp v. Anderson*^{||} and *Gillett v. Abbott*.[¶]

Cur. adv. vult.

LORD DENMAN, C.J., in the same term (April 27th, 1840) delivered the judgment of the Court. This was an action on an agreement made in consideration of giving up a former guarantee. Plea that the guarantee was not, in fact, given up. On a former trial, before Alderson, B., the paper in question was produced without a stamp. The learned judge received the evidence, and we thought the case sufficiently doubtful to grant a rule for a new trial. The plaintiff submitted to its being made absolute, and a second trial took place before my Brother Erskine at the last assizes. In deference to the former decision, which had not been overruled, but was only in a course of investigation, and, as we understand, with some intimation that he thought the evidence admissible, he received evidence that the paper (at the time of the trial destroyed) had been given up in an unstamped state, which raised precisely the same point. A motion for a new trial, on this ground, has now been made, but upon more consideration we agree in opinion with the two learned judges, and think that the paper, for the purpose for which it was produced, required no stamp.

The authority mainly relied on for the opposite doctrine is *Jardine v. Paine*,^{**} but the unstamped paper there was the very bill of exchange in respect of which the action was brought, and through which the plaintiff must have made out his title to recover. There was an attempt to resort to the unstamped paper to show the amount due, which would have been successful if the acknowledgment referring to it had been made to the plaintiff, but it was made to the holder of the bill; and direct proof of the bill was therefore necessary. The principle of that decision may be taken from Lord Tenterden's words in giving judgment; it cannot be proved unstamped as a security. Now the paper here called a guarantee was not wanted as a security, but as a description of the consideration for the defendant's promise. An inadequate security might, from various motives, be a very good consideration; and this document, if produced, might have been read to the jury to show that it answered the description in the dec-

^{*} 1 B. & Ad. 663.

[†] 4 M. & W. 361.

[‡] 4 A. & E. 877.

[§] April 16th. Before Lord Denman, C.J., Littledale, Patteson, and Coleridge, JJ.

^{||} 1 Stark. N. P. C. 35.

[¶] 7 A. & E. 783.

^{**} 1 B. & Ad. 663.

WHITE, EXECUTOR OF JOHN BLUETT, DECEASED, v.
WILLIAM BLUETT.

IN THE EXCHEQUER, NOVEMBER 21, 1853.

[Reported in 23 Law Journal Reports, Exchequer, New Series, 36.]

THE declaration contained a count upon a promissory note made by the defendant payable to the testator, and a count for money lent.

Plea, as to the said first count, and as to so much of the residue of the declaration as relates to money payable by the defendant to the said J. Bluett for money lent to the defendant, that the said note in the said first count mentioned was delivered by him to the said J. Bluett as in the declaration supposed, and by the said J. Bluett taken and received from the defendant for and on account of the said money so payable to the said J. Bluett as in this plea mentioned, and the causes of action in respect thereof, and by way of securing the same, and for or on account of no other debt claim, matter or thing whatsoever. And the defendant further saith that the said J. Bluett was the father of the defendant, and that afterward, and after the accruing of the causes of action to which this plea is pleaded, and before this suit, and in the lifetime of the said J. Bluett, the defendant complained to his said father that he, the defendant, had not received at his hands so much money or so many advantages as the other children of the said J. Bluett, and certain controversies arose between the defendant and his said father, concerning the premises, and the said J. Bluett afterward admitted and declared to the defendant that his, the defendant's, said complaints were well founded, and, therefore, afterward, etc., it was agreed by and between the said J. Bluett and the defendant that the defendant should forever cease to make such complaints, and that in consideration thereof, and in order to do justice to the defendant, and also out of his, the said J. Bluett's, natural love and affection toward the defendant, he, the said J. Bluett, would discharge the defendant of and from all liability in respect of the causes of action to which this plea is pleaded, and would accept the said agreement on his, the defendant's, part in full satisfaction and discharge of the said last-mentioned

laration of a guarantee, though it was not a *binding* guarantee for want of a stamp. If the defendant had simply pleaded that the guarantee was without a stamp, such plea would have been held bad on demurrer.

Rule refused.—ED.

causes of action ; and the defendant further saith, that afterward, and in the lifetime of the said J. Bluett, and before this suit, he, the said J. Bluett, did accept of and from the defendant the said agreement as aforesaid, in full satisfaction and discharge of such mentioned causes of action.

Demurrer and joinder.

Bovill in support of the demurrer. The plea is not good as to either count. There is no consideration for giving up the claim on the money count, and there is no discharge of the liability on the note.

[PARKE, B. By the law merchant the holder may discharge the acceptor of his liability, if he sufficiently expresses his intention not to insist upon payment ; but there is no such intention here averred.]

T. J. Clark in support of the plea. The plea shows an agreement by the defendant, and that in consideration of such agreement the father agreed to forego the debt.

[PARKE, B. Is an agreement by a father, in consideration that his son will not bore him, a binding contract ?]

The plea avers that the complaints were well founded. The adequacy of the consideration for a promise is not a matter of inquiry. A promise is a good consideration for a promise, if the promisee takes upon himself a liability which did not before attach to him. Here the son had a right to make the complaints mentioned, and his agreeing to forego that right and abstain from doing what he legally might do is a good consideration, because he would have been liable to an action if he had broken his promise. It falls exactly within the definition of a consideration in Chitty on Contracts, p. 28, as the defendant subjected himself to an obligation by his promise, and also to a detriment by not being able to continue his well-grounded complaints. A binding agreement with mutual promises is a good accord. He cited Com. Dig. tit. "Accord" (B) 4, and *Haigh v. Brooks*.¹

POLLOCK, C.B. The plea is clearly bad. By the argument a principle is pressed to an absurdity, as a bubble is blown until it bursts. Looking at the words merely, there is some foundation for the argument, and, following the words only, the conclusion may be arrived at. It is said the son had a right to an equal distribution of his father's property, and did complain to his father because he had not an equal share, and said to him, "I will cease to complain if you will not sue upon this note." Whereupon the father said, "If you will promise me not to complain I will give up the note." If such a plea as this could be supported, the following would be a binding promise : A

¹ 10 Ad. & E. 309 ; s. c. 9 Law J. Rep. (N. S.) Q. B. 99.

man might complain that another person used the public highway more than he ought to do, and that other might say, "Do not complain, and I will give you £5." It is ridiculous to suppose that such promises could be binding. So, if the holder of a bill of exchange were suing the acceptor, and the acceptor were to complain that the holder had treated him hardly, or that the bill ought never to have been circulated, and the holder were to say, "Now if you will not make any more complaints I will not sue you." Such a promise would be like that now set up. In reality, there was no consideration whatever. The son had no right to complain, for the father might make what distribution of his property he liked; and the son's abstaining from doing what he had no right to do can be no consideration.

PARKE, B. I am of the same opinion. The agreement could not be enforced against the defendant. It is not immaterial also to observe that the testator did not give the note up. It was formerly doubted whether a simple agreement could be pleaded in bar (*Lynn v. Bruce*¹), but there have been many modern cases in which third persons have been parties to the agreement, and the agreement has been held to be an answer, and it may be that such an agreement would do, although third persons were not parties to it. But that question does not arise here, as there was no binding agreement at all by the defendant.

ALDERSON, B. If this agreement were good, there could be no such thing as a *nudum pactum*. There is a consideration on one side, and it is said the consideration on the other is the agreement itself; if that were so there could never be a *nudum pactum*.

PLATT, B., concurred.

Judgment for the plaintiff.

HART v. MILES.

IN THE COMMON PLEAS, APRIL 23, 1858.

[*Reported in 4 Common Bench Reports, New Series, 371.*]

THE first count of the declaration stated that, in consideration that the plaintiff would consent to the defendant's retaining possession of two bills of exchange, one for £25 and the other for £24 10s. 6d., each drawn by the defendant upon and accepted by the plaintiff, and payable to the defendant's order, and to

¹ 2 H. Black. 317.

which bills the plaintiff was then entitled, and of which the defendant was then the holder, but not for value, the defendant promised the plaintiff that, if he should succeed in procuring the said bills or either of them to be discounted, he would pay to Messrs. Sotheron & Richardson the proceeds of such discounting, or a sufficient part thereof, in discharge of another bill of exchange for £45 5s. 10d., or of so much thereof as such proceeds would satisfy; and the defendant succeeded in procuring the said first-mentioned bills to be discounted, and the plaintiff did all things necessary to have the defendant perform his said promise, and a reasonable time for the defendant so to do elapsed; yet the defendant broke his said promise in this, that he did not pay the proceeds, or any part thereof, to the said Messrs. Sotheron & Richardson, in discharge of the said bill of exchange for £45 5s. 10d., or any part thereof; by reason whereof the said Messrs. Sotheron & Richardson obtained judgment in an action at law against the plaintiff for the amount of the last-mentioned bill, and damages and costs, amounting to a large sum, to wit, £51 4s. 2d., and issued execution thereon, and caused the plaintiff's goods to be seized and sold in satisfaction of the said judgment, and of the poundage, costs, and expenses of the said execution, amounting in the whole to a large sum, to wit, £64 2s. 10d., and of certain arrears of rent; and by reason thereof the goods of the plaintiff, to a much greater value than the amount of those moneys, were sold under the said execution, for the purpose of raising the said moneys; and thereby the plaintiff was greatly injured in his expectations, and ruined in his business and circumstances, and greatly harassed and impoverished; and by reason thereof also the plaintiff became liable to pay the two first-mentioned bills, and may have to pay the same, and was put to costs and charges in and about endeavoring to procure the holder of those bills not to sue the plaintiff thereon.

The defendant pleaded, among other pleas, secondly, that he did not succeed in procuring the said bills to be discounted as alleged. Issue thereon.

The cause was tried before Williams, J., at the sittings in London after last term. It appeared that the defendant received the two bills on June 30th, 1857, and paid them in to his account at his bankers', where they were entered short, but that, shortly afterward, he obtained an advance from the bankers, upon an understanding that any bills in their hands belonging to him might be discounted. The execution took place on August 7th, and the bills became due in September.

On the part of the defendant, it was submitted that this was

a mere naked bailment, and that the defendant was acting as agent for Messrs. Sotheron & Richardson.

The learned judge left it to the jury to say whether the defendant made the agreement upon his own responsibility, whether he did succeed in getting the bills discounted, and whether he knew of the discount before the date of the execution, telling them that if he did know of the discount before that event, there was an end of the case, except as to damages; but that if he did not, he would not be liable.

The jury returned a verdict for the plaintiff—damages, £75.

Wordsworth, Q.C., now moved for a new trial on the grounds of misdirection, and that the verdict was against evidence, and also in arrest of judgment as to the first count. He submitted that the question of agency ought to have been more pointedly put to the jury, and that they should have been told that the defendant was not responsible for the accidental passing of the bills to his debit by his bankers without his authority. As to the arrest of judgment, he contended that the count disclosed no consideration whatever for the defendant's promise; and that, and at the utmost, it disclosed a mere bailment without reward. [WILLES, J. If there be any consideration, we cannot inquire into the adequacy of it. *Haigh v. Brooks*, 10 Ad. & E. 409, 4 P. & D. 288.]

CROWDER, J. I am of opinion that there is no ground for arresting the judgment in this case. Looking at the whole declaration, though it certainly is somewhat vague, I think it may be supported, and that the consideration stated is sufficient. The statement is that, in consideration that the plaintiff would consent to the defendant's retaining possession of two bills of exchange (describing them), to which bills the plaintiff was then entitled, and of which the defendant was then the holder, but not for value, the defendant promised, etc. It is clear that the bills were the plaintiff's property, and that he was entitled to the possession of them; and it is equally clear that they were in the possession of the defendant without value. Instead of requiring him to give them up, the plaintiff consents that the defendant shall retain them for a given purpose—viz., to get them discounted. That is a sufficient consideration for the defendant's promise to dispose of the proceeds in the manner agreed upon, if he succeeded in getting the bills discounted. If the defendant had not made the promise he did, the plaintiff might have handed the bills over to somebody else for the purpose of procuring them to be discounted. I think the consideration was sufficient to support the promise. As to the alleged misdirection, I am at a loss to discover in what it consisted. It

is said that the learned judge should have told the jury that the defendant got no benefit from the transaction ; and, further, that he had been pressed with an argument that the case was one of agency only—that the defendant was acting merely as agent for Sotheron & Richardson—and that that should have been put to the jury. The learned judge did ask the jury whether the defendant made the agreement upon his own responsibility. That was in effect putting the question of agency to them. The defendant clearly did not make the promise as agent ; it was an original undertaking. I see no ground therefore for granting a rule upon this point. But, with regard to the evidence, we will speak to the learned judge.

WILLES, J. I agree with my Brother Crowder that there was no misdirection. As to the arrest of judgment, I also agree with him in thinking that the declaration discloses a sufficient consideration for the defendant's promise. If the pleader had reflected a little, he would probably have stated it thus, in consideration of the plaintiff's consenting to the defendant's retaining possession of the bills, and getting the same discounted if he could, the defendant promised, etc. I rather think he was considering how the promise would have looked had it been gathered from a correspondence between the parties. If the defendant had written to the plaintiff thus, " In consideration of your consenting to my retaining the bills in my possession, I undertake, if I succeed in procuring them to be discounted, to hand over the proceeds to you ;" and the plaintiff had answered, " I assent to the terms of your letter ;" there would have been a contract between them that the defendant should procure the bills to be discounted if he could and hand over the proceeds. That is the contract which is to be implied here. It is *do ut facias*, or *facio ut facias*. That brings me to my last observation. If this be not a sufficient consideration, the defendant might have procured the bills to be discounted without being compellable to hand over the proceeds. Assuming that there was no consideration in the first instance, the fact of the defendant's getting the money in the end makes him liable, just as a man who gives a guarantee for goods to be supplied to a third person incurs no liability until the goods are supplied, the contract being until then entirely unilateral.

BYLES, J. I am of the same opinion. The true meaning of the declaration I conceive to be this, that the plaintiff intrusts or continues to intrust the two bills, which are his property, to the defendant upon certain terms. I think, for the reasons given by my Brother Willes, that was a good consideration moving from the plaintiff for the defendant's promise to hand

over the proceeds if he succeeded in getting the bills discounted. And further, as my Brother Crowder observes, if the defendant had not retained the bills, the plaintiff might have got them discounted elsewhere. The loss of that opportunity was a detriment to the plaintiff, which would be of itself a sufficient consideration. Further, the declaration alleges that the defendant afterward succeeded in getting the bills discounted, but failed to pay over the proceeds. There is, therefore, a good consideration for the defendant's promise at least in three ways.

CROWDER, J., on a subsequent day intimated that he had conferred with Cresswell, J., and that the Court saw no ground for disturbing the verdict upon the evidence.

Rule refused.

TALBOTT v. STEMMONS' EXECUTOR.

IN THE COURT OF APPEALS OF KENTUCKY, OCTOBER 21, 1889.

[*Reported in 89 Kentucky Reports 222.*]

J. H. Brent for appellant.

Lockhart & Lyng for appellee.

PRYOR, J., delivered the opinion of the Court.

This case comes from the Superior Court by an appeal.

Mrs. Sallie D. Stemmons, the step-grandmother of the plaintiff, Albert R. Talbott, made with the latter the following agreement :

“ April 26, 1880.

“ I do promise and bind myself to give my grandson, Albert R. Talbott, \$500 at my death if he will never take another chew of tobacco or smoke another cigar during my life, from this date up to my death ; and if he breaks this pledge, he is to refund double the amount to his mother.

(Signed)

“ ALBERT R. TALBOTT,
SALLIE D. STEMMONS.”

The grandmother died, and this action was instituted by the grandson against her personal representative to recover the \$500, the plaintiff alleging that, from the date of the agreement to the filing of this action by him, he had not smoked a cigar or taken a chew of tobacco, etc.

A general demurrer was filed to the petition that was sustained by the Court below, and the action dismissed. It is insisted by counsel for the personal representative that the

agreement by the grandmother to pay the \$500 is not based on a sufficient consideration, either good or valuable, and being a mere gratuitous undertaking, cannot be enforced.

There is nothing in such an agreement inconsistent with public policy, or any act required to be done by the plaintiff in violation of law, but, on the contrary, the step-grandmother was desirous of inducing the grandson to abstain from a habit, the indulgence of which, she believed, created an useless expense, and would likely, if persisted in, be attended with pernicious results. An agreement or promise to reform her grandson in this particular was not repugnant to law or good morals, nor was the use of what the latter deemed a luxury or enjoyment a violation of either, and so there was nothing in the law preventing the parties from making a valid contract in reference to the subject-matter.

In the classification of contracts by the elementary writers, it is said : " An agreement by the one party to give, in consideration of something to be done or forbore by the other party, or the agreement by one to do or forbear in consideration of something to be given by the other, are such contracts, when not in violation of law, as will be held valid." Whether the act of forbearance or the act done by the party claiming the money was or not of benefit to him is a question that does not arise in the case. If he has complied with his contract, although its performance may have proved otherwise beneficial, the performance on his part was a sufficient consideration for the promise to pay.

The right to enjoy the use of tobacco was a right that belonged to the plaintiff, and not forbidden by law. The abandonment of its use may have saved him money or contributed to his health ; nevertheless the surrender of that right caused the promise, and having the right to contract with reference to the subject-matter, the abandonment of the use was a sufficient consideration to uphold the promise.

Parsons, in his work on Contracts, says : " The subject-matter of every contract is something which is to be done or which is to be omitted," and where the consideration is valuable, need not be adequate. (Vol. I., 7th ed., 489.) If, therefore, one parts with that he has the right to use and enjoy, the question of injury or benefit to the party seeking a recovery, by reason of a full performance on his part, will not be inquired into, because if he had the legal right to use that which he has ceased to use by reason of the promise, the law attaches a pecuniary value to it.

If this was an action to recover such damages as the party

had sustained by reason of the violation of the covenant or promise, the verdict or judgment would doubtless be nominal only ; but where the parties have agreed on the amount to be paid on the performance of certain conditions, when a compliance with those conditions has been alleged and shown, the sum agreed on must be paid. Whether or not the mother of the young man could recover the penalty imposed, on his failure to comply with his undertaking, is not necessary to be decided. It is sufficient to say that the abandonment of the use of tobacco was such a consideration as authorized a recovery of the sum agreed on.

The judgment of the Circuit Court is reversed, and cause remanded with directions to overrule the demurrer, and for proceedings consistent with this opinion.

LOUISA W. HAMER, APPELLANT, v. FRANKLIN SIDWAY,
AS EXECUTOR, ETC., RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, SECOND DIVISION,
APRIL 14, 1891.

[*Reported in 124 New York Reports 538.*]

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made July 1st, 1890, which reversed a judgment in favor of plaintiff entered upon a decision of the Court on trial at Special Term and granted a new trial.

This action was brought upon an alleged contract.

The plaintiff presented a claim to the executor of William E. Story, Sr., for \$5000 and interest from February 6th, 1875. She acquired it through several *mesne* assignments from William E. Story, second. The claim being rejected by the executor, this action was brought. It appears that William E. Story, Sr., was the uncle of William E. Story, second ; that at the celebration of the golden wedding of Samuel Story and wife, father and mother of William E. Story, Sr., on March 20th, 1869, in the presence of the family and invited guests he promised his nephew that if he would refrain from drinking, using tobacco, swearing, and playing cards or billiards for money until he became twenty-one years of age he would pay him a sum of \$5000. The nephew assented thereto and fully performed the conditions inducing the promise. When the nephew arrived at

the age of twenty-one years, and on January 31st, 1875, he wrote to his uncle informing him that he had performed his part of the agreement, and had thereby become entitled to the sum of \$5000. The uncle received the letter, and a few days later, and on February 6th, he wrote and mailed to his nephew the following letter :

“ BUFFALO, February 6, 1875.

“ W. E. STORY, Jr.

“ DEAR NEPHEW : Your letter of the 31st ult. came to hand all right, saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have \$5000, as I promised you. I had the money in the bank the day you was twenty-one years old that I intend for you, and you shall have the money certain. Now, Willie, I do not intend to interfere with this money in any way till I think you are capable of taking care of it, and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right, and lose this money in one year. The first \$5000 that I got together cost me a heap of hard work. You would hardly believe me when I tell you that to obtain this I shoved a jack-plane many a day, butchered three or four years, then came to this city, and after three months' perseverance I obtained a situation in a grocery store. I opened this store early, closed late, slept in the fourth story of the building in a room 30 by 40 feet, and not a human being in the building but myself. All this I done to live as cheap as I could to save something. I don't want you to take up with this kind of fare. I was here in the cholera season '49 and '52, and the deaths averaged 80 to 125 daily, and plenty of small-pox. I wanted to go home, but Mr. Fisk, the gentleman I was working for, told me if I left then, after it got healthy he probably would not want me. I stayed. All the money I have saved I know just how I got it. It did not come to me in any mysterious way, and the reason I speak of this is that money got in this way stops longer with a fellow that gets it with hard knocks than it does when he finds it. Willie, you are twenty-one, and you have many a thing to learn yet. This money you have earned much easier than I did, besides acquiring good habits at the same time, and you are quite welcome to the money. Hope you will make good use of it. I was ten long years getting this together after I was your age. Now, hoping this will be satisfactory, I stop. One thing more. Twenty-one years ago I bought you fifteen sheep. These sheep were put out to double every four years. I kept track of them the first eight years ; I have not heard

much about them since. Your father and grandfather promised me that they would look after them till you were of age. Have they done so? I hope they have. By this time you have between 500 and 600 sheep, worth a nice little income this spring. Willie, I have said much more than I expected to. Hope you can make out what I have written. To-day is the seventeenth day that I have not been out of my room, and have had the doctor as many days. Am a little better to-day; think I will get out next week. You need not mention to father, as he always worries about small matters.

“Truly yours,

“W. E. STORY.

“P.S.—You can consider this money on interest.”

The nephew received the letter, and thereafter consented that the money should remain with his uncle in accordance with the terms and conditions of the letters. The uncle died on January 29th, 1887, without having paid over to his nephew any portion of the said \$5000 and interest.

H. J. Swift for appellant.

Adelbert Moot for respondent.

PARKER, J.¹ The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator, William E. Story, became indebted to his nephew, William E. Story, second, on his twenty-first birthday in the sum of \$5000. The trial Court found as a fact that “on March 20th, 1869, . . . William E. Story agreed to and with William E. Story, second, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become twenty-one years of age, then he, the said William E. Story, would at that time pay him, the said William E. Story, second, the sum of \$5000 for such refraining, to which the said William E. Story, second, agreed,” and that he “in all things fully performed his part of said agreement.”

The defendant contends that the contract was without consideration to support it, and, therefore, invalid. He asserts that the promisee by refraining from the use of liquor and tobacco was not harmed, but benefited; that that which he did was best for him to do independently of his uncle's promise, and insists that it follows that unless the promisor was bene-

¹ Only so much of the opinion is given as relates to the question of consideration. A portion of the opinion containing a citation and discussion of cases involving the question of consideration has also been omitted.—ED.

fited, the contract was without consideration. A contention, which if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was, in fact, of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The Exchequer Chamber, in 1875, defined consideration as follows: "A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other." Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him." (Anson's Prin. of Con. 63.)

"In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise." (Parsons on Contracts, 444.)

"Any damage or suspension or forbearance of a right will be sufficient to sustain a promise." (Kent, Vol. II., 465, 12th ed.)

Pollock, in his work on Contracts, page 166, after citing the definition given by the Exchequer Chamber already quoted, says: "The second branch of this judicial description is really the most important one. Consideration means not so much that one party is profiting as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first."

Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him \$5000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the Court will not inquire into it; but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been support the position we have taken.

The order appealed from should be reversed and the judgment of the Special Term affirmed, with costs payable out of the estate.

All concur.

Order reversed and judgment of Special Term affirmed.

DUNTON v. DUNTON.

IN THE SUPREME COURT OF VICTORIA, MARCH 31, 1892.

[*Reported in 18 Victorian Law Reports 114.*]

SPECIAL case stated by the judge of the County Court, at Melbourne.

The plaintiff brought an action to recover payment of £6 under an agreement made between the plaintiff and defendant. The agreement was in the following form: "Memorandum of agreement made and entered into August 30th, 1890, between John Dunton and Louisa Dunton, formerly the wife of John Dunton. Whereas the said marriage, had and solemnized between the said John Dunton and Louisa Dunton, was, on March 12th, 1890, dissolved by the Supreme Court upon the petition of John Dunton, and whereas, notwithstanding the said dissolution, the said John Dunton is desirous of making provision for the said Louisa Dunton so long as she, the said Louisa Dunton, shall conduct herself with sobriety, and in a respectable, orderly, and virtuous manner. Now this agreement witnesseth that in the consideration of the premises the said John Dunton hereby agrees to pay the said Louisa Dunton the sum of £6 per month, from September 1st, 1890, she thereout maintaining and clothing herself; such sum to be payable on the first day in every month during the continuance of this agreement, the first of such payments to be made on September 1st, 1890. Provided always that in the event of the said Louisa Dunton at any time committing any act whereby she or the said John Dunton shall, or may, become subjected to personal hate, contempt, or ridicule, or if the said Louisa Dunton shall not conduct herself with sobriety, and in a respectable, orderly, and virtuous manner, and with all respect to the said John Dunton, then the said John Dunton may, at his option, immediately cease the payment of the above-mentioned sum, and put an end to this agreement." The question for the consideration of the full Court was whether this agreement was

binding or whether it was *nudum pactum* for want of consideration.

Skinner for the plaintiff.

Cussen for the defendant.

HOOD, J. Louisa Dunton sued John Dunton in the County Court to recover the sum of £6 as the amount agreed to be paid by the defendant under a written agreement for the maintenance of the plaintiff. At the trial a question was raised as to whether the alleged agreement was binding upon the defendant, and that question was reserved for the opinion of this Court.

The document is called a memorandum of agreement, and apparently was signed by both parties. It recites that they had been married, but that the marriage had been dissolved on the petition of the husband, and it then proceeds as follows: "And whereas, notwithstanding the said dissolution, the said John Dunton is desirous of making provision for the said Louisa Dunton so long as she, the said Louisa Dunton, shall conduct herself with sobriety, and in a respectable, orderly, and virtuous manner. Now this agreement witnesseth that in consideration of the premises the said John Dunton agrees to pay the said Louisa Dunton the sum of £6 per month." It then contains a proviso that in the event of Louisa Dunton committing any act whereby she or the said John Dunton may be subjected to hate, contempt, or ridicule, or if she shall not conduct herself with sobriety, and in a respectable, orderly, and virtuous manner, and with all respect to the said John Dunton, then he may put an end to the agreement.

The motive of the defendant in signing this document is clear. He desired to provide for the woman who had been his wife, and who was the mother of his children, in such a way as to induce her not to disgrace herself, him, or them. But the question we have to decide is whether this document constitutes a valid agreement, and we have nothing to do with the motives of the parties except so far as they are expressed in a binding legal document. A man's motives cannot form any consideration for a contract. If this document is to be held binding upon the defendant, it must be because there is some legal consideration moving from the plaintiff upon which the defendant's promise is founded. In my opinion the only consideration expressed on the face of the document is the defendant's desire to make provision for the plaintiff, and that clearly would not be sufficient. It was, however, contended that the real consideration is an implied promise by her that she will conduct herself with sobriety, and in a respectable, orderly, and virtuous man-

ner, and that the benefit to the defendant would lie in the prevention of the annoyance and disgrace that might be caused to him and his children in the event of the plaintiff misbehaving herself. I cannot imply such a promise from the document, but even if it were expressed therein it would not, in my opinion, constitute a consideration for the defendant's agreement. A promise in order to be a good consideration must be such as may be enforced. It must, therefore, be not only lawful, and in itself possible, but it must also be reasonably definite. Now, a promise by a woman that she will conduct herself with sobriety, and in a respectable, orderly, and virtuous manner, seems to me to be about as vague a promise as can well be imagined. What are the acts which she is to do or to refrain from doing? What is the meaning to be attached to the words if looked at in the light of a definite promise? A promise by a woman that she will conduct herself with sobriety may mean that she will not drink intoxicating liquor at all, or that she will not get drunk, or it may mean that she may do either so long as she does not do so in public. So with conducting herself in a virtuous manner. Is that in public or in private, and does it include anything short of unchastity? As to respectability and order, they are words of such varying meaning that I cannot understand any agreement about them. All this makes me unable to see any promise whatever made by the plaintiff in this document, and in any event forces me to the conclusion that such a promise is too uncertain to form the consideration for any legal agreement. A contract founded upon such an illusory consideration appears to me to be as invalid as a promise by a father made in consideration that his son would not bore him (*White v. Bluett*¹); and it is not nearly so certain as an agreement by a married woman that she would attend upon her aged father and mother as long as they lived, and provide them with necessary services, and in consideration thereof her father should, when requested, transfer to her his interest in certain land; an agreement which the late Molesworth, J., considered void for uncertainty (*Shiels v. Drysdale*²). It must be remembered that we have not here to consider a case of a plaintiff being induced to alter her position by reason of a promise made by the defendant. The plaintiff does not allege that she did, or refrained from doing, anything depending upon the defendant's promise. If she had stated that she did not get drunk, as she otherwise would have done, or that she remained chaste or orderly or respectable solely in consequence of the defendant's promise, and relying thereon, she might, perhaps, have

¹ 23 L. J. Ex., at p. 37, per Parke, B.² 6 V. L. R. Eq. 126.

brought herself under a different rule ; but the very suggestion of such a statement shows to my mind the impossibility of its ever forming the consideration for the contract upon which alone she sues.

For these reasons I find myself unable to concur in the judgment of the Court.

HIGINBOTHAM, C.J. This is a special case by the learned judge of the County Court at Melbourne, under § 135 of the County Court Act 1890. The question reserved for the opinion of this Court is whether the agreement (Exhibit A) in the action is binding, or is *nudum pactum* for want of consideration. The agreement is in the following terms.¹

I am of opinion that this agreement is binding, and that it is not *nudum pactum*, or void for want of consideration. It has been contended for the defendant that the written agreement discloses no consideration for the defendant's promise to pay the plaintiff £6 per month, that his promise therefore was a purely voluntary one, and performance of it cannot be enforced by action. The agreement was signed by the plaintiff. The terms of it clearly imply, in my opinion, a promise on her part that she will conduct herself with sobriety, and in a respectable, orderly, and virtuous manner. But it was said that this was only a promise to do that which the plaintiff was already bound to do, and that such a promise does not constitute a good consideration.² It is true that if a person promises not to do something which he cannot lawfully do, and which, if done, would be either a legal wrong to the promisee, or an act forbidden by law, such promise is no consideration for the promise of the other party to the alleged contract founded on mutual promises. The case of *Jamieson v. Renwick*,³ and the authorities there cited, support that rule. But they also show that a promise not to do, or to do something which the promisor may lawfully and without wrong to the promisee do or abstain from doing, is a good consideration. In the present case the plaintiff was released by the decree for the dissolution of marriage from her conjugal obligation to the defendant to conduct herself with sobriety, and in a respectable, orderly, and virtuous manner ; and conduct of an opposite character would not necessarily involve a breach on her part of any human law other than the law of marriage, which had ceased to bind her. She was legally at

¹ The agreement has been omitted.—Ed.

² So much of the case as relates to the sufficiency of such a promise as a consideration should be considered in connection with the cases *infra*, pp. .—Ed.

³ 17 V. L. R. 124.

liberty, so far as the defendant was concerned, to conduct herself in these respects as she might think fit, and her promise to surrender her liberty and to conduct herself in the manner desired by the defendant constituted, in my opinion, a good consideration for his promise to pay her the stipulated amount. I am of opinion, for this reason, that there was a good legal consideration to support this agreement, and I answer the question accordingly. The proper order as to costs of the hearing of this case will be that they abide the event of the action.

WILLIAMS, J. In my opinion there is a consideration for the agreement upon which the plaintiff sues, and it is binding upon the defendant as long as the plaintiff observes her undertaking, necessarily implied in the agreement, that she will conduct herself with sobriety, and in a respectable, orderly, and virtuous manner. The plaintiff signs this agreement and she is bound by it, and the penalty upon her, if she fails to observe her undertaking, is that, immediately she does so fail, all benefit to her under the agreement ceases. The defendant's promise to pay her the £6 per month is stated in the agreement itself to be made "in consideration of the premises," and one of those premises is the plaintiff's undertaking to conduct herself with sobriety, and in a respectable, orderly, and virtuous manner. Then, it is said, this undertaking of hers is nothing, as it only amounts to an undertaking by her to do that which she was under a legal obligation to do. From this proposition I dissent. She was under no legal obligation to the defendant, or to any one, not to get drunk in her own or any friend's house. She was under no legal obligation to the defendant, or to any one, not to consort with persons, male or female, of bad moral character. She was under no legal obligation to the defendant, or to any one, not to allow a paramour to have sexual connection with her. She was entitled in these and other respects to pursue her own course of conduct. Now, turning to the facts as gathered from the agreement and the evidence, it appears that the defendant had obtained a divorce from the plaintiff, and that the issue of their marriage had been five young children, all living at the time the agreement was made. It is true, and it is most important to bear in mind, that with the dissolution of the marriage her conjugal obligations to the defendant ceased. It was, perhaps, by reason of this consequence that the defendant entered into this agreement with the plaintiff and procured her to enter into it with him. It may have been, and probably was, of some moment to the defendant to hold out a substantial inducement to the plaintiff to agree to conduct herself, and to conduct herself in the manner stipulated by himself.

She had been his wife, she was so no longer, but she still remained the mother of his five young children. Remaining under no conjugal obligations to him, he probably deemed it advantageous and desirable that she, who remained the mother of his children, should conduct herself in such a way as not to bring discredit upon her offspring. In effect he says to her: "If you, who now owe me no duty as a wife, will agree to my stipulation, I will, so long as you observe that stipulation, pay you £6 per month." Thereupon she signifies her agreement and her assent to observe that stipulation by signing the agreement. The case of *White v. Bluett*¹ is, in my opinion, not an authority against the view I have taken. In that case, Pollock, C.B., came to the conclusion that the agreement set up by the son was *nudum pactum*, and so no answer to the father's cause of action, upon the express ground that the son had no right to complain of the father's distribution of the property; for the father might make what distribution of his property he liked, and the son's abstaining from doing what he had no right to do could be no consideration.

My answer to the question stated is that there is sufficient consideration to support the agreement sued on.

Lyons & Turner for the plaintiff.

Connelly & Thatchell for the defendant.

CARLILL v. CARBOLIC SMOKE BALL COMPANY.

IN THE COURT OF APPEAL, DECEMBER 6, 7, 1892.

[*Reported in Law Reports, 1 Queen's Bench* (1893) 256.]

APPEAL from a decision of Hawkins, J.²

The defendants, who were the proprietors and vendors of a medical preparation called "The Carbolic Smoke Ball," inserted in the *Pall Mall Gazette* of November 13th, 1891, and in other newspapers, the following advertisement:

"£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. £1000 is deposited with the Alliance Bank, Regent Street, showing our sincerity in the matter.

¹ 23 L. J. Exch., p. 36.

² [1892] 2 Q. B. 484.

"During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball.

"One carbolic smoke ball will last a family several months, making it the cheapest remedy in the world at the price, 10s., post free. The ball can be refilled at a cost of 5s. Address Carbolic Smoke Ball Company, 27 Princes Street, Hanover Square, London."

The plaintiff, a lady, on the faith of this advertisement, bought one of the balls at a chemist's, and used it as directed, three times a day, from November 20th, 1891, to January 17th, 1892, when she was attacked by influenza. Hawkins, J., held that she was entitled to recover the £100. The defendants appealed.

Finlay, Q.C., and *T. Terrell* for the defendants.

Dickens, Q.C., and *W. B. Allen* for the plaintiff.

LINDLEY, L.J. [The Lord Justice stated the facts, and proceeded.]

I come now to the last point which I think requires attention—that is, the consideration.¹ It has been argued that this is *nudum pactum*—that there is no consideration. We must apply to that argument the usual legal tests. Let us see whether there is no advantage to the defendants. It is said that the use of the ball is no advantage to them, and that what benefits them is the sale; and the case is put that a lot of these balls might be stolen, and that it would be no advantage to the defendants if the thief or other people used them. The answer to that, I think, is as follows. It is quite obvious that in the view of the advertisers a use by the public of their remedy, if they can only get the public to have confidence enough to use it, will react and produce a sale which is directly beneficial to them. Therefore, the advertisers get out of the use an advantage which is enough to constitute a consideration.

But there is another view. Does not the person who acts upon this advertisement and accepts the offer put himself to some inconvenience at the request of the defendants? Is it nothing to use this ball three times daily for two weeks according to the directions at the request of the advertiser? Is that to go for nothing? It appears to me that there is a distinct inconvenience, not to say a detriment, to any person who so uses the smoke ball. I am of opinion, therefore, that there is ample consideration for the promise.

We were pressed upon this point with the case of *Gerhard v.*

¹ Only so much of the opinions is given as relates to this question.—ED.

Bates,¹ which was the case of a promoter of companies who had promised the bearers of share warrants that they should have dividends for so many years, and the promise as alleged was held not to show any consideration. Lord Campbell's judgment when you come to examine it is open to the explanation, that the real point in that case was that the promise, if any, was to the original bearer and not to the plaintiff, and that as the plaintiff was not suing in the name of the original bearer there was no contract with him. Then Lord Campbell goes on to enforce that view by showing that there was no consideration shown for the promise to him. I cannot help thinking that Lord Campbell's observations would have been very different if the plaintiff in that action had been an original bearer, or if the declaration had gone on to show what a *société anonyme* was, and had alleged the promise to have been, not only to the first bearer, but to anybody who should become the bearer. There was no such allegation, and the Court said, in the absence of such allegation, they did not know (judicially, of course) what a *société anonyme* was, and, therefore, there was no consideration. But in the present case, for the reasons I have given, I cannot see the slightest difficulty in coming to the conclusion that there is consideration.

It appears to me, therefore, that the defendants must perform their promise, and if they have been so unwary as to expose themselves to a great many actions, so much the worse for them.

BOWEN, L.J. I am of the same opinion.

A further argument for the defendants was that this was a *nudum pactum*—that there was no consideration for the promise—that taking the influenza was only a condition, and that the using the smoke ball was only a condition, and that there was no consideration at all—in fact, that there was no request, express or implied, to use the smoke ball. Now I will not enter into an elaborate discussion upon the law as to requests in this kind of contracts. I will simply refer to *Victors v. Davies*² and Manning's note to *Fisher v. Pyne*,³ which everybody ought to read who wishes to embark in this controversy. The short answer, to abstain from academical discussion, is, it seems to me, that there is here a request to use involved in the offer. Then as to the alleged want of consideration. The definition of "consideration" given in Selwyn's *Nisi Prius*, 8th ed., p. 47, which is cited and adopted by Tindal, C.J., in the case of *Laythoarp v. Bryant*,⁴ is this: "Any act of the plaintiff from which the defendant derives a benefit or advantage, or any labor,

¹ 2 E. & B. 476.

³ 1 M. & G. 265.

² 12 M. & W. 758.

⁴ 3 Scott, 238, 250.

detriment, or inconvenience sustained by the plaintiff, provided such act is performed or such inconvenience suffered by the plaintiff, with the consent, either express or implied, of the defendant." Can it be said here that if the person who reads this advertisement applies thrice daily, for such time as may seem to him tolerable, the carbolic smoke ball to his nostrils for a whole fortnight, he is doing nothing at all—that it is a mere act which is not to count toward consideration to support a promise (for the law does not require us to measure the adequacy of the consideration). Inconvenience sustained by one party at the request of the other is enough to create a consideration. I think, therefore, that it is consideration enough that the plaintiff took the trouble of using the smoke ball. But I think also that the defendants received a benefit from this user, for the use of the smoke ball was contemplated by the defendants as being indirectly a benefit to them, because the use of the smoke balls would promote their sale.

Then we were pressed with *Gerhard v. Bates*.¹ In *Gerhard v. Bates*,² which arose upon demurrer, the point upon which the action failed was that the plaintiff did not allege that the promise was made to the class of which alone the plaintiff was a member, and that therefore there was no privity between the plaintiffs and the defendant. Then Lord Campbell went on to give a second reason. If his first reason was not enough, and the plaintiff and the defendant there had come together as contracting parties, and the only question was consideration, it seems to me Lord Campbell's reasoning would not have been sound. It is only to be supported by reading it as an additional reason for thinking that they had not come into the relation of contracting parties; but, if so, the language was superfluous. The truth is, that if in that case you had found a contract between the parties there would have been no difficulty about consideration; but you could not find such a contract. Here, in the same way, if you once make up your mind that there was a promise made to this lady who is the plaintiff, as one of the public—a promise made to her that if she used the smoke ball three times daily for a fortnight and got the influenza, she should have £100, it seems to me that her using the smoke ball was sufficient consideration. I cannot picture to myself the view of the law on which the contrary could be held when you have once found who are the contracting parties. If I say to a person, "If you use such and such a medicine for a week I will give you £5," and he uses it, there is ample consideration for the promise.

¹ 2 E. & B. 476.

² *Ibid.*

A. L. SMITH, L.J. Lastly, it was said that there was no consideration, and that it was *nudum pactum*. There are two considerations here. One is the consideration of the inconvenience of having to use this carbolic smoke ball for two weeks three times a day ; and the other more important consideration is the money gain likely to accrue to the defendants by the enhanced sale of the smoke balls, by reason of the plaintiff's use of them. There is ample consideration to support this promise. I have only to add that as regards the policy and the wagering points, in my judgment, there is nothing in either of them.

Appeal dismissed.

CRISP *v.* GOLDING.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1586.

[*Reported in 1 Leonard 296.*]

IN an action upon the case by Crisp *v.* Golding the case was, that a *feme sole* was tenant for life, and made a lease to the plaintiff for five years, to begin after the death of tenant for life, and afterward, October 18th, made another lease to the same plaintiff for twenty-one years, to begin at Michaelmas next before ; and declaring upon all the said matter, he said, *virtute cujus dimissionis*—*i.e.*, the later lease, the plaintiff entered and was possessed *crast. fest. S. Mich.* which was before the lease made ; and further declared, that in consideration that the plaintiff had assigned to the defendant these two leases, the defendant promised, etc., and upon *non assumpsit* it was found for the plaintiff, and damages taxed £600. Coke argued for the plaintiff against the Solicitor-General, who had taken divers exceptions to the declaration. 1. Where two or many considerations are put in the declaration, although that some be void, yet if one be good the action well lieth, and damages shall be taxed accordingly ; and here the consideration that the plaintiff should assign *totum statum, titulum, and interesse suum quod habet in terra prædict.* 2. Exception, that the lease in possession was made after Michaelmas, i. October 18th, and the declaration is, *virtute cujus dimissionis*, the defendant entered *crastino Mich.* and then he was a disseisor, and could not assign his interest and right, which was suspended in the tortious disseisin, and so it appeared to the judges ; and he said there was not here any disseisin, although that the lessee had entered before that the lease was made ; for there was an agreement and communica-

tion before of such purposed and intended lease, although it was not as yet effected, and if there were any assent or agreement that the lessee should enter, it cannot be any disseisin, and here it appeareth that the lease had his commencement before the making of the lease, and before the entry ; but put case it be a disseisin, yet he assigned all the interest *quod ipse tunc habuit*, according to the words of the consideration, and he delivered both the indentures of the said demises, and *quacunque via data*, be the assignment good or void it is not material as to the action, for the consideration is good enough. *Egerton* solicitor contrary. In every action upon the case, upon *assumpsit*, there ought to be a consideration, promise, and breach of promise, and here in our case the consideration is the assignment of a lease, which is to begin after the death of the lessor, who was but tenant for life, which is merely void, and that appeareth upon the record ; and as to the second part of the consideration, and the assignment of the second lease, it appeareth that the plaintiff at the time had but a right, for by his untimely entry before the making of the lease, he was not to be said lessee, but was a wrongdoer, etc., in 19 Eliz. in the King's Bench this difference was taken by the justices there, and delivered openly by the Lord Chief Justice. 1. When in an action upon the case, upon *assumpsit*, two considerations or more are laid in the declaration, but they are not collateral, but pursuant, as A. is indebted to B. in £100 and A. promiseth to B. that in consideration that he oweth him £100, and in consideration that B. shall give to A. 2s. that he will pay to him the said £100 at, such a day, if B. bring an action upon the case upon this *assumpsit*, and declares upon these two promises, although the consideration of the 2s. be not performed, yet the action doth well lie ; but if they be collateral considerations, which are not pursuant, as if I, in consideration that you are of my counsel, and shall ride with me to York, promise to give to you £20 in this case all the considerations ought to be proved, otherwise the action cannot be maintained. So in our case the considerations are collateral, and therefore they ought to be proved ; and afterward judgment was given for the plaintiff.

BRADBURNE *v.* ELIZABETH BRADBURNE.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1589.

[*Reported in Croke, Elizabeth, 149.*]

ASSUMPSIT. The Court held where there are divers considerations alleged by the plaintiff, and some are frivolous and void ; yet if any of these be good, the plaintiff shall recover. And it was so adjudged.

TISDALE.

IN THE QUEEN'S BENCH, EASTER TERM, 1600.

[*Reported in Croke, Elizabeth, 758.*]

ASSUMPSIT. The case was that Tisdale, administrator, had a judgment against him for a debt of the intestate's, and promised to the recoverer thereof, in consideration that he would forbear to sue execution against him until Octabis Mich. that he would pay unto him the sum recovered at Michaelmas ; and at Michaelmas he failed of payment ; and after and before Octab. Mich. he brought an *assumpsit*. And this matter being shown to the Court, it was moved, first, that this consideration is not sufficient to maintain the action, for the forbearance betwixt Michaelmas and Octab. Mich. is void. The Court held it to be well enough, for if part of the consideration be good it sufficeth, and he ought to allege performance of that part of the consideration which is material and valuable. But where a consideration consists of two or three parts, and every one of them is valuable, there of necessity he ought to show performance of every part thereof. They also held that the consideration to forbear to sue execution for a time certain was good cause to ground that action. But it hath been adjudged that a consideration to forbear *paululum temporis* is void, for it is not certain ; and *paululum tempus* is not *temporis pars*. And the suit after Michaelmas, before Octabis, was well, because the *assumpsit* was not performed by the non-payment at Michaelmas. But of that was the greatest doubt.

CRISP v. GAMEL.

IN THE KING'S BENCH, HILLARY TERM, 1605.

[Reported in Croke, James, 128.]

IT was resolved that where, in an *assumpsit*, two considerations be alleged, the one good and sufficient, and the other idle and vain, if that which is good be proved, it sufficeth ; and although he fails in the proof of the other, it is not material, because it was in vain to allege it, and it is as if it had not been alleged.

LENERET v. RIVET.

IN THE KING'S BENCH, MICHAELMAS TERM, 1617.

[Reported in Croke, James, 503.]

ASSUMPSIT. Whereas one Thomas Ogle had acknowledged himself to be indebted to the plaintiff in £10 for divers trespasses done to him, which £10 the plaintiff, at the defendant's request, was contented to accept of ; that the defendant, in consideration that the plaintiff, at the defendant's request, would acquit and discharge the said Thomas Ogle of the said debt, and permit him to carry out of the plaintiff's house certain goods of the said Thomas Ogle's, which were then there, assumed and promised the plaintiff to pay him the said £10 at such a day ; and alleges, in fact, that he acquitted and discharged the said Thomas Ogle of the said £10 debt, and suffered him to carry away his said goods out of his house ; and that the defendant had not paid the said £10 to the plaintiff according to his promise.

The defendant pleaded *non assumpsit*, and it was found against him.

It was now moved in arrest of judgment that the declaration was not good, because he doth not show how he acquitted the said Thomas Ogle, for it cannot be without deed, which ought to be particularly shewn ; and although the consideration, to suffer him to carry out of the plaintiff's house the said goods, had been a sufficient consideration, and was well alleged if it had been by itself, yet when it is joined with another consideration which is good, if it had been alleged to have been per-

formed, it not being well alleged to have been performed, makes the whole declaration to be ill.

The Court was of that opinion. Wherefore it was adjudged for the defendant.

MARY KING, JOHN KING, AND SILVANUS KING, EXECUTRIX AND EXECUTORS OF THE WILL OF JAMES KING, DECEASED, v. MATTHEW URLWIN SEARS.

IN THE EXCHEQUER, EASTER TERM, 1835.

[*Reported in 2 Crompton, Meeson & Roscoe 48.*]

ASSUMPSIT. The first count of the declaration stated that the defendant, before and at the time of the making of the promise and undertaking thereafter next mentioned, was the administrator of the goods, chattels, and effects of William Sears, deceased, who died intestate theretofore, to wit, on August 10th, in the year of our Lord 1833; that the said William Sears in his lifetime, and at the time of his death, was indebted to the plaintiffs, as executrix and executors as aforesaid, in a certain sum of money, to wit, the sum of £13, being rent due and in arrear for the use and occupation of certain premises of the plaintiffs, as executrix and executors as aforesaid, before then used and occupied by the said William Sears, by the sufferance and permission of the plaintiffs, as executrix and executors as aforesaid, and at his request, under and by virtue of a certain demise thereof theretofore made, and at and under a certain yearly rent, to wit, the yearly rent of £26, payable quarterly, to wit, on March 25th, June 24th, September 29th, and December 25th in every year; that the said William Sears in his lifetime being so indebted as aforesaid, he, the said Williams Sears, deposited with the plaintiffs, as executrix and executors as aforesaid, as a collateral security for the said debt, a certain bill of exchange, bearing date of March 12th, in the year aforesaid, drawn by the said William Sears on and accepted by one Joseph Fabian, for payment, five months after date, to the drawer's order, of the sum of £16 14s. for value received, and which said bill of exchange, at the time of the depositing of the same as aforesaid, was endorsed by the said William Sears; that the said William Sears, at the time of his death, was in possession of the said demised premises under and by virtue of the said demise, and after the death of the said William Sears, and up to, and at, and after the making the promise and undertaking hereinafter

next mentioned, Winifred, the widow of the said William Sears, and the mother of the defendant, was in possession of the said demised premises, and was then possessed of certain goods and chattels of great value, to wit, of the value of £50, and which said goods were then in and upon the said demised premises, and were then liable to be seized and distrained for the said rent; and the plaintiffs, as executrix and executors as aforesaid, then intended to distrain the same for the said rent; and the said Winifred was desirous of quitting the said demised premises at Michaelmas then next, and of removing the said goods and chattels from and off the same (of all which said premises the defendant then had notice); and thereupon afterward, to wit, on September 24th, in the year aforesaid, in consideration of the premises, and that the plaintiffs, as executrix and executors as aforesaid, would permit the said Winifred to quit the said demised premises at Michaelmas then next, and to remove her said goods and chattels from and off the said premises, and would forbear to distrain the same for the said rent so due and in arrear as aforesaid, and for the further sum of £6 10s., being another quarter's rent, which would become due to the plaintiffs, as executrix and executors as aforesaid, under the said demise, at the said Michaelmas then next, he, the defendant, undertook and then faithfully promised the plaintiffs, as executrix and executors as aforesaid, to pay them one quarter's rent, being the sum of £6 10s., immediately, and the remainder of the said rent within twelve months then next, the said bill of exchange being given up by the plaintiffs to the defendant. And the plaintiffs aver that they, confiding in the said promise and undertaking of the defendant, did permit the said Winifred to quit the said demised premises at the said Michaelmas, and to remove her said goods and chattels from and off the said demised premises, and did wholly forbear then, and always hitherto have forborne, to distrain the same for the said rent as aforesaid (whereof the defendant had notice); and, although the said twelve months have long since elapsed, and although the plaintiffs, as executrix and executors as aforesaid, afterward, and after the expiration of the said twelve months, to wit, on October 15th, 1834, requested the defendant to pay the said rent, being a large sum, to wit, the sum of £19 10s., and also tendered and offered to give up the said bill of exchange to the defendant, which he then refused to accept, yet, etc. Breach, non-payment of the sum of £19 10s.

The last count was *indebitatus assumpsit* for the use and occupation of a certain messuage and premises, with the appurtenances, of the plaintiffs, as executrix and executors, and for

money found to be due to them as such, upon an account stated, laying the promise to the plaintiffs, as executrix and executors as aforesaid.

General demurrer to the first count, and *non assumpsit* to the last.

The grounds stated for argument in the margin of the paper book were :

First, that by the first count it appears that the bill of exchange therein mentioned was at the time of making the defendant's supposed promise overdue, and it is not averred to have been dishonored ; so that the rent of £13, supposed to have been in arrear from William Sears, deceased, appears to have been satisfied thereby ; and the forbearance to distrain for that sum of £13, which forms part of the consideration stated for the defendant's promise, is therefore insufficient.

Secondly, that it does not appear on the first count that the plaintiffs had any right to distrain for the quarter's rent, which is supposed to have been becoming due to them at Michaelmas mentioned therein ; and so the forbearance to distrain for the sum of £6 10s. in respect thereof, which forms part of the consideration stated for the defendant's promise, is insufficient to support such promise, and renders the same of none effect.

Thirdly, that the consideration expressed in the first count as moving the defendant to the promise therein alleged is not stated to have been at the defendant's request, as, to give the same any effect, it ought to have been.

Fourthly, that it does not appear, nor can it be collected from the first count, whether the plaintiffs seek to recover against the defendant, as administrator of his late father, or personally.

ERLE in support of the demurrer. First, the bill of exchange, as appears by the declaration, was given as a collateral security for the rent ; but the plaintiffs do not state that any steps were taken by them, on the bill becoming due, to obtain payment of it, nor do they aver any presentment, or show that it was dishonored, which it was their duty, as holders, to have done, and, not having done so, it amounted to a satisfaction of the debt for which the bill was given—that is to say, the £13 for rent due from William Sears. It was the duty of the plaintiffs to have shown on their declaration that they had done all the acts necessary to entitle them to recover on the bill. [LORD ABINGER, C.B. It is stated in the declaration to have been given as a collateral security. The action is not brought on the bill itself.] It is submitted that it was incumbent on them to show that the bill was duly presented ; and if they fail to do so, then they must be taken to have made the bill their own,

and it operated as a satisfaction for the rent of £13, and the forbearance to distrain for that sum, which formed part of the consideration for the defendant's promise, failed. [PARKE, B. Though the bill was not duly presented, that objection might have been waived afterward.] If the consideration fails to that extent, then the whole promise is *nudum pactum*. Another part of the consideration stated, is the agreement not to distrain the goods of the widow to recover the sum of £6 10s. for rent to become due the Michaelmas following; but, as the rent was not then due, the plaintiffs could have no right to distrain for it, and, consequently, that was no consideration whatever. [LORD ABINGER, C.B. Was it not a privilege granted to her to be allowed to give up the tenancy at Michaelmas?] The executors could not compel her to remain, as she was a stranger to them. The allegation is that, in consideration that the plaintiff would permit the widow to quit the demised premises at Michaelmas then next, and to remove her goods and chattels from the premises, and would forbear to distrain for the said rent so due and in arrear, and for the sum of £6 10s. to become due at Michaelmas then next, the defendant undertook to pay the £6 10s. immediately, and the remainder within twelve months, the bill of exchange being given up by the plaintiffs to the defendant; but the rent of £6 10s. was not due, and they had no right to distrain for that sum, and therefore there is a failure of consideration. [PARKE, B. The giving up the note is one consideration, and the forbearance to distrain the goods of the widow on the premises for the rent then due from the intestate is another consideration.] At all events, the whole of the consideration stated for the defendant's promise is not shown, and therefore the promise is not supported. [PARKE, B. If a sufficient consideration remains, it is enough to support the promise laid in the declaration. There is abundant consideration.] Then the consideration alleged as moving the defendant to make the promise is not stated to have been at the request of the defendant. [PARKE, B. That would only be material in the case of an executed consideration. An averment of request is only necessary in cases of executed consideration.]

Judgment for the plaintiffs.

JAMIESON *v.* RENWICK.

IN THE SUPREME COURT OF VICTORIA, APRIL 2, 3, 1891.

[*Reported in 17 Victorian Law Reports 124.*]

APPEAL from County Court. The plaintiff was for money due on an agreement and on account stated. [The agreement is set out in the judgment.] The defences were that the agreement sued on was not an actionable one, that under the Stamps Act the agreement required a stamp, as it contained a promise to pay, and that the agreement had been broken by the plaintiff. The learned judge gave a verdict for the plaintiff for £25, and from this finding the defendant appealed.

Cussen for appellant.

Macdermott for plaintiff respondent.

HIGINBOTHAM; C.J., delivered the judgment of the Court [HIGINBOTHAM, C.J., HOOD, and MOLESWORTH, JJ.]. This is an appeal from the County Court at Sandhurst. In the action the learned judge gave a verdict for the plaintiff for £25. The action was brought on a document purporting to be an agreement, and it has been objected that this document is one not admissible in evidence, on the ground that it does not bear a stamp.

The next ground of objection is that this promise is a voluntary one, a promise to make a gift; that, in fact, no consideration for making the promise is shown by the instrument, and that therefore the agreement is not one on which an action can be brought. The agreement is an extremely peculiar one, and not easy of comprehension. It opens with a recital that "John Renwick, of his own free will, as and by way of gift, and subject to the proviso and agreement hereinafter contained, doth agree to pay to the said John Jamieson the annual sum of £25." That promise is subject to this proviso: "Provided, however, and it is hereby agreed, that if the said John Jamieson shall reside, attempt, claim, or threaten to reside in Sandhurst aforesaid, or shall visit, annoy, or interfere in any way with the said John Renwick, either personally, or by letter or messenger, or shall claim, or attempt to claim, any interest or right to the land of the said John Renwick, or to occupy the same, or shall, in the opinion of the said John Renwick, not conduct himself in a proper and becoming manner as a member of society, then the said John Renwick shall be entitled to put an end absolutely to this agreement, and shall be at liberty to refuse any further

payment to the said John Jamieson.''' This proviso constitutes a condition for the payment of money by the defendant ; the fulfilment of the conditions of the proviso constitutes the promises made on his part by the plaintiff. Some of these promises constitute a good consideration for the promise of the defendant. The first condition or promise, that Jamieson shall not reside, nor attempt, claim, or threaten to reside in Sandhurst, relates to an act or acts which the plaintiff is at liberty to do or not to do, and the performance of which would not amount to any wrong done to the defendant. The second condition, that the plaintiff shall not personally, or by letter or messenger, claim or attempt to claim any interest in defendant's land, relates to an act which the plaintiff is at perfect liberty to do without committing any wrong. The plaintiff can advance any legal claim which he is advised is a good one. The promise not to visit the defendant is a valid promise. To annoy or interfere with the defendant is an unlawful act, and therefore the promise to forbear from so doing is not one which constitutes a good consideration. The principles guiding the Court in cases like this appear in *Bracewell v. Williams*.¹ There it was held that a promise not to apply for costs under the Bankruptcy Act was a sufficient consideration to support a contract to pay the amount of such costs ; but that a promise to conduct proceedings in bankruptcy so as to injure as little as possible the debtor's credit, was not a good consideration to support a contract. Erle, C.J., says, at page 198 : "The second count is, I think, also bad ; it really amounts to this : in consideration that I do not abuse the process of the Court for a purpose other than that for which it was intended—viz., the recovery of my debt, by using it as a means of exposure of you, you will perform your promise. The consideration, therefore, is really the abstaining from an abuse of the process of the Court." A promise that a person will not do what he lawfully may is a good consideration. But a promise not to do what is unlawful does not constitute a good consideration. In the present case we think that there are sufficient promises constituting a good consideration to support the promise made by the defendant. A promise not to annoy is nugatory. The second objection therefore fails in our opinion.

In dealing with the third objection, that the judgment was against evidence, it is necessary to look at the last condition of the proviso : "Provided that the said John Jamieson shall, in the opinion of the said John Renwick, not conduct himself in a proper and becoming manner as a member of society," then

¹ L. R. 2 C. P. 196.

the defendant can put an end to the agreement. This raises the question as to whether the defendant has or has not honestly, and to the best of his ability, exercised his right to form an opinion of the nature of the plaintiff's conduct as a member of society. This is certainly a very strange condition, but remarkable as it may be, the parties to the agreement have made it. The question to be determined is not whether the plaintiff has conducted himself in a proper and becoming manner as a member of society, but whether he has done so in the opinion of the defendant. [His Honor then examined the evidence at length, and proceeded.] We think that all the evidence shows that there is no reason for coming to the finding that the defendant has not honestly and fairly exercised the power given to him by the agreement, and he has been therefore justified in putting an end to the agreement and refusing to pay money under it to the plaintiff. A review of the whole of the evidence strengthens the judgment formed by the defendant that the plaintiff did not conduct himself in a proper manner as a member of society in accordance with the terms of the agreement. We think, therefore, that the judgment of the learned judge was against the evidence, and on this ground a new trial will be allowed, unless the plaintiff within one week elect to accept a nonsuit with costs. If he do not so elect, then new trial on the usual terms, and appeal allowed with costs.

Crabbe, Cohen & Kirby for the plaintiff.

Connelly & Tatchell for the defendant.

THE PRESBYTERIAN CHURCH OF ALBANY, APPELLANT, *v.* THOMAS C. COOPER ET AL., AS ADMINISTRATORS, ETC., RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, MARCH 5, 1889.

[*Reported in 112 New York Reports 517.*]

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made the first Tuesday of May, 1887, which reversed a judgment in favor of plaintiff, entered upon the report of a referee, and ordered a new trial. (Reported below, 45 Hun, 453.)

This was a reference under the statute of a disputed claim against the estate of Thomas P. Crook, defendant's intestate. The claim arose under a subscription paper, of which the following is a copy :

"We, the undersigned, hereby severally promise and agree to and with the trustees of the First Presbyterian Church in this city of Albany, in consideration of \$1 to each of us in hand paid and the agreements of each other in this contract contained, to pay on or before three years from the date hereof to said trustees the sum set opposite to our respective names, but upon the express condition, and not otherwise, that the sum of \$45,000 in the aggregate shall be subscribed and paid in for the purpose hereinafter stated; and if within one year from this date said sum shall not be subscribed or paid in for such purpose, then this agreement to be null and of no effect. The purpose of this subscription is to pay off the mortgage debt of \$45,000, now a lien upon the church edifice of said church, and the subscription or contribution for that purpose must equal that sum in the aggregate to make this agreement binding.

"Dated May 18th, 1884."

The defendants' intestate made two subscriptions to this paper, one of \$5000 and the other of \$500. He paid upon the subscription \$2000. The claim was for the balance.

Matthew Hale for appellant.

Walter E. Ward for respondent.

ANDREWS, J. It is, we think, an insuperable objection to the maintenance of this action, that there was no valid consideration to uphold the subscription of the defendants' intestate. It is, of course, unquestionable that no action can be maintained to enforce a gratuitous promise, however worthy the object intended to be promoted. The performance of such a promise rests wholly on the will of the person making it. He can refuse to perform, and his legal right to do so cannot be disputed, although his refusal may disappoint reasonable expectations, or may not be justified in the forum of conscience. By the terms of the subscription paper the subscribers promise and agree to and with the trustees of the First Presbyterian Church of Albany, to pay to said trustees, within three years from its date, the sums severally subscribed by them, for the purpose of paying off "the mortgage-debt of \$45,000 on the church edifice," upon the condition that the whole sum shall be subscribed or paid in within one year. It recites a consideration—viz., "in consideration of \$1 to each of us (subscribers) in hand paid and the agreement of each other in this contract contained." It was shown that the \$1 recited to have been paid was not in fact paid, and the fact that the promise of each subscriber was made by reason of and in reliance upon similar promises by the others constitutes no consideration as between the corporation for whose benefit the promise was made and the promisors. The

recital of a consideration paid does not preclude the promisor from disputing the fact in a case like this, nor does the statement of a particular consideration which, on its face, is insufficient to support a promise, give it any validity, although the fact recited may be true.

It has sometimes been supposed that when several persons promise to contribute to a common object, desired by all, the promise of each may be a good consideration for the promise of others, and this although the object in view is one in which the promisors have no pecuniary or legal interest, and the performance of the promise by one of the promisors would not in a legal sense be beneficial to the others. This seems to have been the view of the chancellor as expressed in *Hamilton College v. Stewart* when it was before the Court of Errors (2 Den. 417), and *dicta* of judges will be found to the same effect in other cases. (Trustees, etc., *v.* Stetson, 5 Pick. 508; *Watkins v. Eames*, 9 Cush. 537.) But the doctrine of the chancellor, as we understand, was overruled when the *Hamilton College Case* came before this Court (1 N. Y. 581), as have been also the *dicta* in the Massachusetts cases, by the Court in that State, in the recent case of *Cottage Street Methodist Episcopal Church v. Kendall* (121 Mass. 528). The doctrine seems to us unsound in principle. It proceeds on the assumption that a stranger both to the consideration and the promise, and whose only relation to the transaction is that of donee of an executory gift, may sue to enforce the payment of the gratuity for the reason that there has been a breach of contract between the several promisors and a failure to carry out as between themselves their mutual engagement. It is in no proper sense a case of mutual promises, as between the plaintiff and defendant.

In the disposition of this case we must, therefore, reject the consideration recited in the subscription paper as ground for supporting the promise of the defendant's intestate, the money consideration, because it had no basis in fact, and the mutual promise between the subscribers, because there is no privity of contract between the plaintiff and the promisors. Some consideration must, therefore, be found other than that expressly stated in the subscription paper, in order to sustain the action. It is urged that a consideration may be found in the efforts of the trustees of the plaintiff during the year, and the time and labor expended by them during that time to secure subscriptions in order to fulfil the condition upon which the liability of the subscribers depended. There is no doubt that labor and services, rendered by one party at the request of another, constitute a good consideration for a promise made by

the latter to the former, based on the rendition of the service. But the plaintiff encounters the difficulty that there is no evidence, express or implied, on the face of the subscription paper, nor any evidence outside of it, that the corporation or its trustees did or undertook to do anything upon the invitation or request of the subscribers. Nor is there any evidence that the trustees of the plaintiff, as representatives of the corporation, in fact did anything in their corporate capacity, or otherwise than as individuals, interested in promoting the general object in view.

Leaving out of the subscription paper the affirmative statement of the consideration (which, for reasons stated, may be rejected), it stands as a naked promise of the subscribers to pay the several amounts subscribed by them for the purpose of paying the mortgage on the church property upon a condition precedent limiting their liability. Neither the church nor the trustees promise to do anything, nor are they requested to do anything, nor can such a request be implied. It was held in *Hamilton College v. Stewart* (1 N. Y. 581) that no such request could be implied from the terms of the subscription in that case, in which the ground for such an implication was, to say the least, as strong as in this case. It may be assumed from the fact that the subscriptions were to be paid to the trustees of the church for the purpose of paying the mortgage, that it was understood that the trustees were to make the payment out of the moneys received. But the duty to make such payment, in case they accepted the money, would arise out of their duty as trustees. This duty would arise upon the receipt of the money, although they had no antecedent knowledge of the subscription. They did not assume even this obligation by the terms of the subscription, and the fact that the trustees applied money, paid on subscriptions, upon the mortgage debt, did not constitute a consideration for the promise of the defendant's intestate. We are unable to distinguish this case in principle from *Hamilton College v. Stewart* (1 N. Y. 581). There is nothing that can be urged to sustain this subscription that could not, with equal force, have been urged to sustain the subscription in that case. In both the promise was to the trustees of the respective corporations. In each case the defendant had paid part of his subscription and resisted the balance. In both, part of the subscription had been collected and applied by the trustees to the purpose specified. In the *Hamilton College Case* (which in that respect is unlike the present one) it appeared that the trustees had incurred expense in employing agents to procure subscriptions to make up the required amount, and it was shown, also,

that professors had been employed upon the strength of the fund subscribed. That case has not been overruled, but has been frequently cited with approval in the courts of this and other States. The cases of *Barnes v. Perine* (12 N. Y. 18) and *Roberts v. Cobb* (103 *id.* 600) are not in conflict with that decision. There is, we suppose, no doubt that a subscription invalid at the time for want of consideration may be made valid and binding by a consideration arising subsequently between the subscribers and the church or corporation for whose benefit it is made. Both of the cases cited, as we understand them, were supported on this principle. There was, as was held by the Court in each of these cases, a subsequent request by the subscriber to the promisee to go on and render service or incur liabilities on the faith of the subscription, which request was complied with, and services were rendered or liabilities incurred pursuant thereto. It was as if the request was made at the very time of the subscription, followed by performance of the request by the promisor. Allen, J., in his opinion in *Barnes v. Perine*, said, "the request and promise were, to every legal effect, simultaneous," and he expressly disclaims any intention to interfere with the decision in the *Hamilton College Case*. In the present case it was shown that individual trustees were active in procuring subscriptions. But, as has been said, they acted as individuals, and not in their official capacity. They were deeply interested, as was Mr. Crook, in the success of the effort to pay the debt on the church, and they acted in unison. But what the trustees did was not prompted by any request from Mr. Crook. They were co-laborers in promoting a common object. We can but regret that the intention of the intestate in respect to a matter in which he was deeply interested, and whose interest was manifested up to the very time of his death, is thwarted by the conclusion we have reached. But we think there is no alternative, and that the order should be affirmed.

All concur.

Order affirmed and judgment accordingly.

WILLIAM U. SHERWIN AND OTHERS, TRUSTEES, v.
SAMUEL W. FLETCHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS,
MAY 21, 1897.

[Reported in 168 Massachusetts Reports 413.]

CONTRACT on the following agreement.

"We, the undersigned subscribers, do hereby agree to pay the sum set against our respective names, the same to be payable under and in accordance with the following conditions, namely :

"1. The money by us subscribed is to be used for the purpose of erecting a building in the town of Ayer, to be used for the manufacture of boots and shoes.

"2. The details regarding the plan under which the subscribers hereto shall organize themselves, and upon which said building shall be erected and rented, shall be hereafter fixed and determined by a majority in numbers and interest of the subscribers hereto, at a meeting to be duly called for that purpose.

"3. No subscription hereto shall be binding until the sum of twelve thousand (\$12,000) dollars shall have been raised.

"SAMUEL W. FLETCHER. \$200."

The declaration alleged that the defendant signed the above contract (a copy whereof was annexed), and thereby agreed, in consideration of other parties signing similar agreements, to pay to such person or persons as should be determined upon by the majority in numbers and interest of such subscribers the sum of \$200, upon the terms and conditions therein specified and set forth ; that the sum of \$12,000 was subscribed ; that at a meeting of such subscribers duly notified and called for that purpose, it was determined by a majority in numbers and interest of the subscribers to organize, and they did so organize under the name of the "Ayer Building Association ;" that the plaintiffs were duly chosen trustees, and by votes of said association were duly authorized and empowered to purchase a tract of land in the town of Ayer, and erect thereon a building for the manufacture of boots and shoes, and to collect all subscriptions ; that, relying upon the promise of the defendant, and being so authorized as aforesaid, they did purchase a tract

of land in the town of Ayer, and erect thereon a building for the manufacture of boots and shoes, and demanded of the defendant the amount of his said subscription, to wit, the sum of \$200, but the defendant refused and still refuses to pay the same.

The defendant demurred to the declaration, assigning as grounds therefor : 1. That it did not appear by said declaration and the contract annexed thereto that the defendant made any promise or agreement to pay the plaintiffs, or any promise or agreement upon which the plaintiffs were entitled to recover ; 2. That the plaintiffs did not allege in their declaration, nor did it appear by the contract, that there was any sufficient consideration for the defendant entering into the contract.

The Superior Court overruled the demurrer ; and the defendant appealed to this Court.

J. M. Maloney for the defendant.

W. H. Atwood for the plaintiffs.

ALLEN, J. The demurrer to the declaration was rightly overruled. The written agreement signed by the defendant was virtually a promise to pay to such person or persons as should be fixed at a meeting of the subscribers. This promise was at the outset an offer, but when steps were taken in pursuance of Article 2, and a plan was fixed and determined as therein provided, and the plaintiffs were chosen trustees, they became the promisees : and when they proceeded to erect a building in reliance upon the subscriptions of the defendant and others, and before any withdrawal or retraction by him, that supplied a good consideration, and the promise became valid and binding in law. *Athol Music Hall Co. v. Carey*, 116 Mass. 471 ; *Davis v. Smith American Organ Co.*, 117 Mass. 456 ; *Cottage Street Church v. Kendall*, 121 Mass. 528 ; *Hudson Real Estate Co. v. Tower*, 156 Mass. 82 ; S. C. 161 Mass. 10.

Judgment affirmed.

(d) *Performance of, or promise to perform a contract obligation as a consideration.*

REYNOLDS v. PINHOWE.

IN THE QUEEN'S BENCH, TRINITY TERM, 1595.

[*Reported in Croke, Elizabeth, 429.*]

ASSUMPSIT. Whereas the defendant had recovered £5 against the plaintiff, in consideration of £4 given him by the plaintiff, that the defendant assumed to acknowledge satisfaction of that judgment before such a day, and that he had not done it.¹ And it was thereupon demurred, for it was moved that there was not any consideration; for it is no more than to give him part of the money which he owed him, which is not any consideration. But all the Court held it to be well enough, for it is a benefit unto him to have it without suit or charge, and it may be there was error in the record, so as the party might have avoided it. Wherefore it was adjudged for the plaintiff.

DIXON v. ADAMS.

IN THE EXCHEQUER CHAMBER, MICHAELMAS TERM, 1596.

[*Reported in Croke, Elizabeth, 538.*]

ASSUMPSIT. For that J. S. and J. D. were obliged to Adams in £40, and thereupon he sued J. S. in the Queen's Bench, in which suit Dixon became bail. Adams recovered, and upon a *scire facias* against Dixon the bail, had judgment against him; and he, without other process, paid the condemnation, and Adams *in consideratione inde* assumed to Dixon to deliver unto him the principal obligation, and a letter of attorney to sue it against J. D.; and for non-performance hereof the action was brought; and upon *non assumpsit* pleaded, and found for the plaintiff, he had judgment; and thereupon error brought because it was not a sufficient consideration. And so it was held by the whole Court, for Dixon had not done any act whereto the law would not have compelled him. Wherefore the judgment was reversed.

¹ Although the obligation of the plaintiff was quasi-contractual, the case is inserted in this connection.—ED.

BAGGE *v.* SLADE.

IN THE KING'S BENCH, EASTER TERM, 1614.

[Reported in 3 *Bulstrode* 162.]

IN a writ of error to reverse a judgment given against him in an action upon the case for a promise. In the town Court of Yevell, *in commitatu* Sommerset. The error assigned and insisted upon was this, because there wanted a good consideration to raise the promise, and so no cause of action.

COKE, C.J. The case was this, two men were bound in a bond for the debt of a third man ; the obligation being forfeited, so that they both of them were liable to pay this. The plaintiff here in this writ of error said to the other, " Pay you all the debt, and I will pay you the moiety of this again," the which he paid accordingly, and so made his request to have a repayment made to him of the moiety according to his promise, which to do he refused. Upon this he brought his action upon the case against the plaintiff upon his promise, and upon *non assumpsit* pleaded, he had a verdict and judgment, and upon this judgment a writ of error was brought. In this case and in the declaration there is a good consideration set forth, the party's own contract here shall bind him, he hath no remedy for the money paid, but when this is paid, here is good *assumpsit* grounded upon a good consideration for repayment of the moiety by the plaintiff.

HAUGHTON, J. Notwithstanding this contract he is still least in danger of the first bond.

COKE. I have never seen it otherwise, but when one draws money from another that this should be a good consideration to raise a promise.

DODDERIDGE, J. If the consideration puts the other to charge, though it be no ways at all profitable to him who made the promise, yet this shall be a good consideration to raise a promise.

COKE agreed with him herein, also if a man be bound to another by a bill in £1000 and he pays unto him £500 in discharge of this bill, the which he accepts of accordingly, and doth upon this assume and promise to deliver up unto him his said bill of £1000, this £500 is no satisfaction of the £1000, but yet this is good and sufficient to make a good promise, and upon a good consideration, because he had paid money, £500, and he had no remedy for this again.

Another matter was moved, that the entry of the judgment was not good, the same being in this manner, *Ideo consideratum fuit, adtunc, and ibidem hic ad eandem Curiam, quod prædictus querens recuperet.*

The whole Court agreed this judgment to be well entered, and that the consideration here is good, and sufficient to raise the promise, and accordingly the rule of the Court was *quod judicium affirmetur.*

Judgment affirmed per CURIAM.

WILKINSON v. BYERS.

IN THE KING'S BENCH, APRIL 24, 1834.

[*Reported in 1 Adolphus & Ellis 106.*]

ASSUMPSIT. The declaration stated that an action had been commenced and prosecuted in the Palace Court by Thomas Rimmer, as the defendant's attorney, in the name of the defendant, against the plaintiff, for the recovery of a certain sum, to wit, £13 10s., alleged to be due from plaintiff to defendant, which action was depending, and costs had been incurred therein, and thereupon, in consideration that plaintiff would pay defendant the said sum of £13 10s., defendant promised plaintiff to settle with the said attorney for the costs of the action, and to indemnify plaintiff and bear him harmless from the same. Averment that plaintiff confiding, etc., paid defendant the said sum, which he accepted; but that defendant did not settle with the attorney, etc., by means and in consequence whereof the attorney proceeded with the action, and judgment was signed against plaintiff, and he was obliged to pay £7 16s. for costs of the action, and £3 for costs of endeavoring to set the judgment aside, of which defendant, on, etc., had notice, but that he did not nor would indemnify plaintiff, etc. Plea, the general issue. At the trial before Patteson, J., at the sittings in Middlesex after Trinity Term, 1833, it appeared that the plaintiff had employed the defendant (who carried on business as a wood-turner) to do work for him; that Rimmer, as the defendant's attorney, served the now plaintiff with a writ at the suit of the present defendant; and that a conversation afterward passed between the parties at the plaintiff's house, which the son of the latter stated in evidence as follows: "My father expressed his surprise that he should have been treated

in that peremptory manner. Byers said he had given no orders that he should be treated in that way ; that he had desired the attorney to write a letter demanding payment of the balance due, and that was all the instructions he had given ; he was extremely sorry such conduct had been pursued by his attorney, he having worked for my father many years, and having no just cause of complaint. My father offered to pay him the amount of the balance of the debt, and, taking into consideration the unjustifiable nature of the proceedings, would not he himself settle with his attorney ? to which Byers readily assented for the reason that he, Byers, himself would not pay anything, he not having given instructions. The money was paid, and a receipt signed by Byers. Subsequently Byers said he would go immediately to Rimmer and settle the question of costs." Another witness, deposing to the same conversation, stated the defendant to have said, that if the plaintiff would pay him the money, as he was in particular want of it that day, he would settle the lawyer's expenses, and the plaintiff should come to no trouble about it. The receipt given by the defendant was as follows :

" Received, March 30th, 1832, of Mr. Wilkinson, the sum of £13 10s., balance of account to this day.

" JOHN BYERS."

The cost at this time amounted to £1 4s. The defendant refused to pay them to the attorney, alleging that he had not authorized him to issue the writ, upon which the further proceedings ensued, which were stated in the declaration. Upon these facts a verdict was found for the now plaintiff, with £10 18s. damages, but leave was given to move to enter a nonsuit, on the ground that the payment being merely the discharge of an admitted debt, was no consideration for a promise by the creditor to the debtor. A rule *nisi* was afterward obtained for entering a nonsuit, or for reducing the damages to £1 4s.

James Scarlett and *Platt* now showed cause.

Kelly, contra.

LITLEDALE, J.¹ I should prefer taking the case as it has just been put by Mr. Kelly—viz., that the sum of £13 10s. was originally due from the plaintiff, and was not fixed by arrangement at the time of the bargain in question. And, viewing it so, I still think the plaintiff is entitled to recover. *Reynolds v. Pinhowe*² is a direct authority on this point. There is indeed another case, *Dixon v. Adams*,³ in the same volume of reports,

¹ Lord Denman, C.J., was at the Privy Council.

² Cro. Eliz. 429.

³ Cro. Eliz. 538

which may appear contradictory. But the promise there was of a very different nature from that in the preceding case and in this. There the obligee of a bond had judgment on *scire facias* against the bail, "and he, without other process, paid the condemnation money; and Adams (the obligee), in *consideration inde*, assumed to Dixon (the bail) to deliver unto him the principal obligation, and a letter of attorney to sue it against J. D." (the obligor); and it was held not a sufficient consideration, "for Dixon had not done any act whereto the law would not have compelled him." And if the promise, as in that case, be to do a collateral thing, the consideration may be insufficient. But here the debtor says, "You have sued me for a debt, and may have trouble in recovering it; if you will forego the costs" (for the stipulation as to paying the attorney amounts merely to that) "I will pay the debt now." If the creditor agreed to these terms, he could not afterward enforce payment of the costs. To do so, he must have proceeded to final judgment; but it would have been against his duty and against law to take that course. We are not now taking into consideration the rights of the attorney, in respect of his lien for costs; but, looking at the case as between the parties, if, after such an undertaking, the plaintiff attempted to go on with the action, it would be a breach of faith, and a contempt, and the Court would stay the proceedings. A promise which the Court would enforce, by restraining the plaintiff from proceeding contrary to the terms entered into, cannot be treated here as a promise made on insufficient consideration, and is quite unlike an undertaking to do something merely collateral, as in the case of *Dixon v. Adams*.¹ I therefore think the rule must be discharged.

PARKE, J. I am of the same opinion. It is not necessary to consider the case on the ground upon which it has been put by my Brother Littledale, though as to that I do not mean to say that I differ in opinion. But the case may be decided shortly on this ground. If an action be brought on a *quantum meruit*, and the defendant agree to pay a less sum than the demand in full, that is a good consideration for a promise by the plaintiff to pay his own costs, and proceed no further. Payment of a less sum than the demand has been held to be no satisfaction in the case of a liquidated debt; but where the debt is unliquidated, it is sufficient. Now here, we cannot say that there was originally any certain demand. A jury, if asked, could not, in my opinion, have said so. In the great majority of actions of this nature, for work, labor, and goods sold, it is not a specific sum that forms the subject-matter of the action, and

¹ Cro. Eliz. 538.

unless that could have been shown in the present case, there was a good consideration for the promise.

PATTESON, J. I am of the same opinion. If a question had been raised upon the record, the words "a certain *alleged* debt" would have been a complete answer to the defendant's objection ; and, indeed, this seems almost admitted. It is consistent with the declaration that there may have been a dispute between the parties as to the sum actually due. The answer attempted is, that the evidence showed the contrary. But, looking to the whole evidence, I think that is not so. The expressions of the plaintiff's son do not support that view of the case ; and it appears that the defendant admitted having instructed his attorney to write a letter, which is not usually done where the party is considered able to pay, unless there be some dispute as to the sum. I do not say that I differ from my Brother Littledale in his view of the case, supposing that there had been an admitted demand, though on that point I am not quite sure. But it is unnecessary to go that length, because it is not clear, in my opinion, that there was a settled and admitted demand. There is no ground for the reduction of damages ; the defendant to fulfil his promise to the plaintiff might have paid the £1 4s. to the attorney, and afterward disputed the matter with him. Whether the Palace Court were right or not, in refusing to set aside the judgment, it was by the defendant's own act that costs exceeding £1 4s. were incurred.

Rule discharged.

SIBREE v. TRIPP.

IN THE EXCHEQUER, JANUARY 16, 1846.

[*Reported in 15 Meeson & Welsby 22.*]

ASSUMPSIT. The first count was upon a promissory note for £50 ; the second and third counts were for money had and received, and on an account stated, the sum laid in each of them being £1000.

The defendant pleaded (with *non assumpsit* and other pleas), fifthly, as to the sum of £500, parcel of the sum in the second and last counts mentioned, that the accounts stated in the last count was stated of and concerning the said sum of £500, parcel, etc., in the said second count mentioned, and no other ; that, after the said causes of action as aforesaid arose, the plaintiff commenced, in the Tolzey Court of Bristol, an action of

debt against the defendant, for the recovery of the said sums of £500 and £500; that the defendant disputed the said supposed debt, and denied that he owed or was liable to pay the same, or that the plaintiff could recover it; and thereupon, to terminate the said dispute and difference, and the claim and demand of the plaintiff in the said debt and action, and finally to determine the said action, the plaintiff and defendant agreed that the said action should be settled by the defendant making and delivering to the plaintiff three promissory notes in writing, by which the defendant should promise to pay to the plaintiff, or order, the sums of £125, £125, and £50 respectively, and that the plaintiff should accept and receive the same in full satisfaction and discharge of the said sums of £500 and £500, and all damages and costs, and that the plaintiff should discontinue the said action. Averment, that the defendant made and delivered to the plaintiff the said three promissory notes, and that the plaintiff accepted the same in full satisfaction and discharge of the said sums of £500 and £500, and the damages and costs, etc. Verification.

Replication, that no such agreement was ever made *modo et forma*, etc.; on which issue was joined.

At the trial, before Pollock, C.B., at the London sittings after last Trinity Term, it appeared that this action was brought to recover the sum of £50 due upon a promissory note, and also the sum of £500, which had, in August, 1843, been deposited by the plaintiff with the defendant for the purpose of a speculation in Spanish stock. At the time of the deposit, the following memorandum was given by the defendant to the plaintiff:

“BRISTOL, August 14, 1843.

“Memorandum. Mr. Sibree has this day deposited with me £500, on the sale of £10,300, £3 per cent Spanish, to be returned on demand.

JAMES T. TRIPP.”

On this document being tendered in evidence, stamped with an agreement stamp, it was objected for the defendant that it amounted to a promissory note, and required a stamp accordingly. The Lord Chief Baron overruled the objection, and received the paper in evidence.

The defendant then proved, in support of his plea, that an action had been brought against him by the plaintiff in the Tolzey Court at Bristol, for the recovery of the sum of £500; when it was agreed between them that the defendant should give, in settlement of the action, three promissory notes, two for £125 each, and the third for £50, payable to the plaintiff

or his order, which he accordingly did ; and the following agreement was thereupon endorsed by Mr. Hinton, the plaintiff's attorney, upon the process served on the defendant :

“ This action is settled by the defendant giving three promissory notes—viz., one at three months, £125 ; one at four months, £125 ; and one at twelve months, £50 ; upon payment of which several promissory notes, I undertake to deliver to Foskett Savery, Esq. [the defendant's attorney], the several papers and letters in my possession in reference to this action.

“ January 6th, 1844.

J. P. HINTON.”

The two promissory notes for £125 each were paid when due, but the third, for £50, was refused payment by the defendant, on the ground of its not having been endorsed. The present action was thereupon brought.

Upon these facts, it was contended, on behalf of the plaintiff, that the fifth plea was not proved ; for that, in order to support that plea, it was necessary to prove not only that the notes were given in satisfaction of the debt, but also that they had been paid. The Lord Chief Baron was of opinion that the plea was proved, and accordingly directed a verdict for the defendant on that issue, giving the plaintiff leave to move to enter a verdict for him for £200. In Michaelmas Term last.

Butt obtained a rule to show cause why the verdict should not be entered for the plaintiff accordingly, or why there should not be judgment for the plaintiff notwithstanding the verdict on the above issue.

Jervis and *Hoggins* now showed cause.

Butt and *Taprell* in support of the rule.

POLLOCK, C.B. The motion of *Butt* in this case was to enter a verdict for the plaintiff on the issue joined on the fifth plea, or for judgment, notwithstanding the verdict found for the defendant on that issue. With respect to the first part of the motion, it involves these two points : First, whether the plaintiff's case was made out by the memorandum proved in evidence ; and, secondly, if it was, whether the answer given by the defendant was available to put an end to the plaintiff's right of action. If the paper proved by the plaintiff amounted to a promissory note, the issue ought to remain as found for the defendant. On consideration of the authorities cited, it appears to me that the memorandum did not amount to a promissory note. It is difficult to lay down a rule which shall be applicable to all cases ; but it seems to me that a *promissory note*, whether referred to in the statute of Anne or in the text-books, means

something which the parties *intend* to be a promissory note. We cannot suppose that the legislature intended to prevent parties from making written contracts relating to the payment of money other than bills and notes ; and this appears to me to be merely an instrument recording the agreement of the parties in respect of a certain deposit of money, the consideration of which is stated in the memorandum itself, and to be rather an agreement than a promissory note.

The second question is, whether the agreement proved by the defendant put an end to this action. [His Lordship read the agreement and the fifth plea.] The only question now is, whether, as matter of evidence, this plea was sustained in proof ; and that turns on the true construction of this endorsement upon the writ in the Tolzey Court of Bristol. We are to put the best construction upon it that we can, and to see whether the intention of the parties was, that the action should cease and the debt should be extinguished ; or whether the plaintiff reserved to himself the right, in case the promissory notes were not paid when due, of suing on the original consideration. It appears to me that the proper construction is, that the parties intended that the action should be settled, and that plaintiff should have a lien on the papers, in order to give the defendant a greater reason for promptness of payment ; but that the notes were given in satisfaction of the debt, and that the *giving* of the notes alone constituted that satisfaction. The words of the agreement seem to import, that, on the giving of the notes, the plaintiff was to look to them as constituting his remedy, and the defendant, to them as constituting his liability. If it were otherwise, then, on the slightest laches as to one of the notes, though all the others were paid when due, and that one the day after, the whole arrangement would be void. On this point, therefore, as matter of evidence, I am of opinion that the plea was proved.

The other part of the rule is to enter judgment for the plaintiff *non obstante veredicto*, on the ground that the giving of these notes could not in point of law be a satisfaction of a liquidated claim for a larger amount. If the case of *Cumber v. Wane* were law, and a binding authority upon us, undoubtedly we could not come to a conclusion in favor of the defendant. That case was one of *assumpsit* for £15, to which the defendant pleaded that he gave the plaintiff a promissory note for £5 in satisfaction, and that the plaintiff received it in satisfaction, and it was held, on writ of error, after judgment for the plaintiff, that the plea was ill. It does not appear from the report, whether the note was payable presently, or whether it was nego-

tible or not. The facts are not sufficiently stated to make it a binding authority. Pratt, C.J., says, in delivering the judgment of the Court: "As the plaintiff had a good cause of action, it can only be extinguished by a satisfaction he agreed to accept; and it is not his agreement alone that is sufficient, but it must appear to the Court to be a reasonable satisfaction; or at least the contrary must not appear, as it does in this case. If £5 be, as is admitted, no satisfaction for £15, why is a simple contract to pay £5 a satisfaction for another simple contract of three times the value? In the case of a bond, another has never been allowed to be pleaded in satisfaction, without a bettering of the plaintiff's case, as by shortening the time of payment." From the latter part of the judgment I must, with every respect for the great authority of that learned judge, express my dissent. Undoubtedly at that time it was not law; for in *Pinnel's Case*, 5 Rep. 117, it was laid down as clear matter of law, that, in the case of a bond for £500, due on January 1st, if the obligee accepted £100 in satisfaction the day before, he was at liberty to do so; and the Court never inquired whether the satisfaction was *reasonable*; they left it to the agreement of the parties. However, it does not appear, in the case of *Cumber v. Wane*, that the promissory note was negotiable, and therefore that the plaintiff had any benefit from it. The marginal note of that case—"Giving a satisfaction for £15"—was expressly denied to be law by Lord Ellenborough in argument in *Heathcote v. Crookshanks*; and Buller, J., referred to a case of *Hardcastle v. Howard*, in which it had been so denied to be law. But whether the case of *Cumber v. Wane* have been overruled or not, it appears to me that it cannot be sustained as an authority that the acceptance of a negotiable security may not be a satisfaction of a claim to a larger amount. *Sard v. Rhodes* is a distinct authority that the acceptance of a negotiable security may be pleaded in satisfaction of a simple contract debt for a *like* amount, and the only question is whether the same doctrine is applicable where the original claim was for a larger amount. I think it is. It is admitted that if there had been an acceptance of a *chattel* in satisfaction of the debt, the Court would not examine whether that satisfaction was a reasonable one, but merely whether the parties came to that agreement; and the acceptance of a negotiable security appears to me to be of the same nature. Again, if a claim is *bond fide disputable*, *Longridge v. Dorville*, 5 B. & Ald. 117,¹ is an authority to show that the party may be barred by the acceptance of a much less sum in satisfaction of it. Here the demand is appar-

¹ E. C. L. R., vol. vii.

ently for a liquidated amount ; but under the count for money had and received, that amount may be very disputable, and the plea avers that in the former action the defendant disputed the said supposed debt, and denied that he owed or was liable to pay it, and thereupon to terminate the dispute and difference, etc., the plaintiff and defendant agreed that the action should be settled by the giving of promissory notes. If so, that was an admission by the plaintiff that the claim was so far disputable as to justify him in coming to such an agreement. Upon the whole, I am of opinion that this plea is a good answer to the action, and that it was proved at the trial, and therefore that this rule ought to be discharged.

PARKE, B. I am also of opinion that this rule ought to be discharged. The first question is, whether this plea was proved. [His Lordship read it.] The issue upon that is, that no such agreement was made as is mentioned in the plea—that is, no agreement to give and accept these promissory notes in satisfaction of the debt. The Lord Chief Baron decided at the trial that the plea was proved, reserving for the opinion of the Court the question on the construction of the agreement. When Butt moved for this rule, I certainly was strongly impressed with the idea that this agreement amounted only to a suspension of the remedy, and not to a satisfaction of the debt ; but after hearing the present argument, and on full consideration of the case, I have come to the same conclusion as my Lord Chief Baron, that the parties meant it to be a final extinguishment of the debt. The agreement is in these terms. [His Lordship read it.] As to the first part of it I have no doubt ; it is a settlement not only of the action, but of the claim. The settlement of an action *primâ facie* means the settlement of the cause of action. And unless the notes were to be substituted as the remedy, the agreement would be of this extraordinary nature, that, if any one of them were not paid at maturity, the whole debt would become due. The reasonable construction therefore is, that it was to be an absolute settlement of the debt, and that the only future liability should be upon these notes. Then comes the second part of the agreement, on which my doubt arose—namely, that upon *payment* of the several promissory notes, the plaintiff undertook to deliver up the papers and letters in his possession in reference to the action. But I think that may well be explained in the manner in which Jervis explained it, that it would be desirable to keep some evidence of the original consideration in case the notes were not paid. Upon the whole instrument, therefore, it appears to me that the real meaning of the parties was, to put an end to the action, and for the larger

sum claimed in it to substitute a smaller, secured by three promissory notes.

The next question is, whether, if proved in fact, this is a good plea in law ; and I am of opinion that it is. I will consider it in the way proposed by Butt, striking out the averments as to its being a disputed debt. It is clear, if the claim be a liquidated and ascertained sum, payment of part cannot be *satisfaction* of the whole, although it may, under certain circumstances, be evidence of a gift of the remainder. But the gift of a thing of uncertain value may be a satisfaction of any sum due on a simple contract. If the contract be by bond or covenant, it can be determined only by something of an equal or higher nature ; but upon a mere simple contract, it is clear that the debtor may give anything of inferior value in satisfaction of the sum due, provided it be not part of the sum itself. Littleton thus lays it down (§ 344) : “ Also in case of feoffment in mortgage, if the feoffer payeth to the feoffee a horse, or a cup of silver, or a ring of gold, or any such thing, in full satisfaction of the money, and the other receiveth it, this is good enough, and as strong as if he had received the sum of money, though the horse or other thing were not of the twentieth part of the value of the sum of money, because that the other hath accepted it in full satisfaction.” The same doctrine is laid down in Pinnel’s Case. It is clear, if the creditor had the money itself, he might buy with it a thing of however inferior value, and that contract would be good, so he may accept the same thing in satisfaction of the whole sum, and that contract is good. In the case of a bond or contract under seal it is different. “ The obligor or feoffer cannot, at the time appointed, pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater ; but if the obligee or feoffee do at the day receive part, and thereof make an acquittance under his seal in full satisfaction of the whole, it is sufficient, by reason the deed amounteth to an acquittance of the whole.”¹ *Eodem ligamine quo ligatum est dissolvitur*. Again, a sum of money payable at a *different time* is a good satisfaction of a larger sum payable at a future day. Com. Dig., Accord (Book 2). In the present case (supposing it a liquidated demand) the satisfaction is by giving a *different thing*, not part of the sum itself, having different properties. It *may be* of equal value, but that we cannot enter into ; it is sufficient that the parties have so agreed. The case of Andrew v. Boughey, Dyer, 75*a*, is an authority in support of this view. There the declaration was for delivering 373 pounds of bad wax upon an *assumpsit*

¹ Co. Litt. 212*b*.

for 400 pounds of good and merchantable wax, stating half the price to have been paid in hand, the rest to be paid upon a day agreed on. To this the defendant pleaded that, before the time appointed for the delivery of the residue of the wax, "the plaintiff and defendant did agree that if the defendant would deliver immediately to the plaintiff one cake of wax weighing 20 pounds, the defendant would accept that in recompense, as well for the aforesaid 373 pounds as for the residue which was to be delivered; and pleaded this executed in certain, with the acceptance by the plaintiff accordingly;" and this plea was held a good answer. The Court says that "the bar seemed good enough, for the effect and substance of the action is that the defendant hath not performed his bargain, *scil.*, with good and merchantable wax, according to his undertaking, but that it was corrupted and mixed as above and deceitful; for which the plaintiff has received satisfaction and recompense by the cake, and his own acceptance, although it were not of one hundredth part of the value of his loss, yet by his own accord and agreement this injury is dispensed with; and in all actions in which nothing but amends is to be recovered in damages, there a concord carried into execution is a good plea." It seems to me that this reasoning applies to the present plea, because here a different thing, of uncertain value, is delivered in satisfaction of the debt.

The cases of *Cumber v. Wane* and *Thomas v. Heathorn* have been referred to. The reasoning of Pratt, C.J., in the former case is certainly not correct, for we cannot inquire into the *reasonableness* of the satisfaction. But there it did not appear that the note was a negotiable one, and the point now before the Court was not made. In *Thomas v. Heathorn* it does not appear to have been a case of accord and satisfaction; although the bill accepted by the defendant was a negotiable security, it does not appear that it was given by way of accord and satisfaction.

As to the other question, whether the statement in this plea, that it was a disputed debt, makes the plea a good answer, I think that is very doubtful, because it does not state that it was disputable on fair and reasonable grounds. This question was considered in the case of *Wilkinson v. Byers*, 1 Ad. & E. 106;¹ 3 Nev. & M. 853, in which it was held that, where an action has been commenced for an *unliquidated* demand, payment by the defendant of an agreed sum in discharge of such demand was a good consideration for a promise by the plaintiff to stay proceedings and pay his own costs. Littledale, J., there

¹ E. C. L. R., vol. xxviii.

went further than the rest of the Court, and expressed his opinion, that, even in the case of *liquidated* demand the same promise, made in consideration of the payment of such sum, might be enforced in an action of *assumpsit*, where the agreement was such that the Court would stay proceedings if the plaintiff attempted to go on. He referred to a case of *Reynolds v. Pinhowe*, Cro. Eliz. 429, where a declaration in *assumpsit*—"that whereas the defendant had recovered £5 against the plaintiff, in consideration of £4 given him by the plaintiff, the defendant assumed to acknowledge satisfaction of that judgment before such a day, and that he had not done it"—was held good, on the ground that it was a benefit to the defendant to have the money without suit or charge. On the authority of that case *Littledale, J.*, held that if there was a dispute as to a *liquidated* debt, the payment and acceptance of a smaller sum might be a good satisfaction. The rest of the Court, however, did not go upon that ground, and therefore I do not rest my judgment upon this point. But, for the reasons I have already stated, I think this plea is good, and that there ought not to be judgment for the plaintiff *non obstante veredicto*.

With respect to the question as to the stamp, it is unnecessary to express any opinion upon it; but I think this document did not require a stamp except as an agreement. This is not a contract to pay money, but a *deposit* of money, and the identical money is to be returned.

ALDERSON, B. As to the question relating to the stamp, we must look at it as it arises on the face of the instrument itself, and I think it bears the construction put upon it by my brother Parke. Then as to the main points in the case, I agree in thinking that here the original debt was discharged merely by the *giving* of the promissory notes, and that the plaintiff was remitted to his only remaining remedy—namely, upon those notes, and had lost his original right of suing upon the original memorandum. If we did not put this construction upon the agreement, we should certainly do great injustice, because by the non-payment of any one of the notes on the very day it became payable, the whole money would become due. That is so strong a circumstance as makes one hesitate to come to such a conclusion, and the literal meaning of the agreement does not require us to do so; for the latter words of it may very well be consistent with the construction we put upon it; the papers being retained, in order, if any doubt arose as to the sufficiency of the consideration when the notes were put in suit, to show its nature in order to enforce them with greater certainty. I think, therefore, that the plea is proved. Then the next ques-

tion is, Is the plea a good one? I consider this as a liquidated demand. Then is there a good answer to it? The suggested answer is that the defendant gave certain promissory notes of a smaller amount, and the plaintiff accepted them in satisfaction and discharge of that demand. It is undoubtedly true that payment of a portion of a liquidated demand, in the same manner as the whole liquidated demand ought to be paid, is *payment* only in part; it is not one bargain, but two—namely, payment of part, and an agreement, without consideration to give up the residue. The Courts might very well have held the contrary, and have left the matter to the agreement of the parties; but undoubtedly the law is so settled. But if you substitute for a sum of money a piece of paper, or a stick of sealing-wax, it is different, and the bargain may be carried out in its full integrity. A man may give in satisfaction of a debt of £100 a horse of the value of £5, but not £5. Again, if the time or place of payment be different, the one sum may be a satisfaction of the other. Let us, then, apply these principles to the present case. If for money you give a negotiable security, you pay it in a different way. The security may be worth more or less; it is of uncertain value. That is a case falling within the rule of law I have referred to. But here there is the further circumstance, that the payment was in discharge of a debt then under litigation, by means of a negotiable security, which takes away that litigation. On these grounds I am of opinion that this plea is good.¹

Rule discharged.

JOHN WESTON FOAKES, APPELLANT, *v.* JULIA BEER,
RESPONDENT.

IN THE HOUSE OF LORDS, MAY 16, 1884.

[*Reported in Law Reports, 9 Appeal Cases 605.*]

APPEAL from an order of the Court of Appeal.²

On August 11th, 1875, the respondent recovered judgment against the appellant for £2077 17s. 2d. for debt and £13 1s. 10d. for costs. On December 21st, 1876, a memorandum of agreement was made and signed by the appellant and respondent in the following terms:

“Whereas the said John Weston Foakes is indebted to the said Julia Beer, and she has obtained a judgment in Her Majesty’s High Court of Justice, Exchequer Division, for the sum

¹ The opinion of Platt, B., has been omitted.—ED. ² 11 Q. B. D. 221.

of £2090 19s. And whereas the said John Weston Foakes has requested the said Julia Beer to give him time in which to pay such judgment, which she has agreed to do on the following conditions. Now this agreement witnesseth that in consideration of the said John Weston Foakes paying to the said Julia Beer on the signing of this agreement the sum of £500, the receipt whereof she doth hereby acknowledge in part satisfaction of the said judgment debt of £2090 19s., and on condition of his paying to her or her executors, administrators, assigns or nominee the sum of £150 on July 1st and January 1st or within one calendar month after each of the said days respectively in every year until the whole of the said sum of £2090 19s. shall have been fully paid and satisfied, the first of such payments to be made on July 1st next, then she the said Julia Beer hereby undertakes and agrees that she, her executors, administrators or assigns, will not take any proceedings whatever on the said judgment."¹

The respondent having in June, 1882, taken out a summons for leave to proceed on the judgment, an issue was directed to be tried between the respondent as plaintiff and the appellant as defendant whether any and what amount was on July 1st, 1882, due upon the judgment.

At the trial of the issue before Cave, J., it was proved that the whole sum of £2090 19s. had been paid by instalments, but the respondent claimed interest. The jury under his Lordship's direction found that the appellant had paid all the sums which by the agreement of December 21st, 1876, he undertook to pay and within the times therein specified. Cave, J., was of opinion that whether the judgment was satisfied or not, the respondent was, by reason of the agreement, not entitled to issue execution for any sum on the judgment.

The Queen's Bench Division (Watkin Williams and Mathew, JJ.) discharged an order for a new trial on the ground of misdirection.

The Court of Appeal (Brett, M.R., Lindley, and Fry, L.JJ.) reversed that decision and entered judgment for the respondent for the interest due, with costs.²

W. H. Holl, Q.C., for the appellant.

Bompas, Q.C. (Gaskell with him) for the respondent.

EARL of SELBORNE L.C. My Lords, upon the construction of the agreement of December 21st, 1876, I cannot differ from the conclusion in which both the Courts below were agreed. If the operative part could properly be controlled by the recitals, I think there would be much reason to say that the only thing

¹ See *supra*, p. 393, n. 1.—ED.

² 11 Q. B. D. 221.

contemplated by the recitals was giving time for payment, without any relinquishment, on the part of the judgment creditor, of any portion of the amount recoverable (whether for principal or for interest) under the judgment. But the agreement of the judgment creditor, which follows the recitals, is that she "will not take any proceedings whatever on the judgment," if a certain condition is fulfilled. What is that condition? Payment of the sum of £150 in every half year, "until the whole of the said sum of £2090 19s." (the aggregate amount of the principal debt and costs, for which judgment had been entered) "shall have been fully paid and satisfied." A particular "sum" is here mentioned, which does not include the interest then due, or future interest. Whatever was meant to be payable at all, under this agreement, was clearly to be payable by half-yearly instalments of £150 each; any other construction must necessarily make the conditional promise nugatory. But to say that the half-yearly payments were to continue till the whole sum of £2090 19s., "and interest thereon," should have been fully paid and satisfied, would be to introduce very important words into the agreement, which are not there, and of which I cannot say that they are necessarily implied. Although, therefore, I may (as indeed I do) very much doubt whether the effect of the agreement, as a conditional waiver of the interest to which she was by law entitled under the judgment, was really present to the mind of the judgment creditor, still I cannot deny that it might have that effect, if capable of being legally enforced.

But the question remains, whether the agreement is capable of being legally enforced. Not being under seal, it cannot be legally enforced against the respondent, unless she received consideration for it from the appellant, or unless, though without consideration, it operates by way of accord and satisfaction, so as to extinguish the claim for interest. What is the consideration? On the face of the agreement none is expressed, except a present payment of £500, on account and in part of the larger debt then due and payable by law under the judgment. The appellant did not contract to pay the future instalments of £150 each, at the times therein mentioned; much less did he give any new security, in the shape of negotiable paper, or in any other form. The promise *de futuro* was only that of the respondent, that if the half-yearly payments of £150 each were regularly paid, she would "take no proceedings whatever on the judgment." No doubt if the appellant had been under no antecedent obligation to pay the whole debt, his fulfilment of the condition might have imported some consideration on his part for that promise. But he was under that antecedent obli-

gation ; and payment at those deferred dates, by the forbearance and indulgence of the creditor, of the residue of the principal debt and costs, could not (in my opinion) be a consideration for the relinquishment of interest and discharge of the judgment, unless the payment of the £500, at the time of signing the agreement, was such a consideration. As to accord and satisfaction, in point of fact there could be no complete satisfaction, so long as any future instalment remained payable ; and I do not see how any mere payments on account could operate in law as a satisfaction *ad interim*, conditionally upon other payments being afterward duly made, unless there was a consideration sufficient to support the agreement while still unexecuted. Nor was anything, in fact, done by the respondent in this case, on the receipt of the last payment, which could be tantamount to an acquittance, if the agreement did not previously bind her.

The question, therefore, is nakedly raised by this appeal, whether your Lordships are now prepared, not only to overrule, as contrary to law, the doctrine stated by Sir Edward Coke to have been laid down by all the judges of the Common Pleas in Pinnel's Case¹ in 1602, and repeated in his note to Littleton, § 344,² but to treat a prospective agreement, not under seal, for satisfaction of a debt, by a series of payments on account to a total amount less than the whole debt, as binding in law, provided those payments are regularly made ; the case not being one of a composition with a common debtor, agreed to, *inter se*, by several creditors. I prefer so to state the question instead of treating it (as it was put at the Bar) as depending on the authority of the case of *Cumber v. Wane*,³ decided in 1718. It may well be that distinctions, which in later cases have been held sufficient to exclude the application of that doctrine, existed and were improperly disregarded in *Cumber v. Wane* ;⁴ and yet that the doctrine itself may be law, rightly recognized in *Cumber v. Wane*,⁵ and not really contradicted by any later authorities. And this appears to me to be the true state of the case. The doctrine itself, as laid down by Sir Edward Coke, may have been criticised, as questionable in principle, by some persons whose opinions are entitled to respect, but it has never been judicially overruled ; on the contrary, I think it has always, since the sixteenth century, been accepted as law. If so, I cannot think that your Lordships would do right, if you were now to reverse, as erroneous, a judgment of the Court of

¹ 5 Rep. 117a.

⁴ *Ibid.*

² Co. Litt. 212b.

⁵ *Ibid.*

³ 1 Sm. L. C. 8th ed. 357.

Appeal, proceeding upon a doctrine which has been accepted as part of the law of England for two hundred and eighty years.

The doctrine, as stated in *Pinnel's Case*,¹ is "that payment of a lesser sum on the day" (it would of course be the same after the day), "in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the judges, that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." As stated in *Coke Littleton*, 212*b*, it is, "where the condition is for payment of £20, the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater;" adding (what is beyond controversy) that an acquittance under seal, in full satisfaction of the whole, would (under like circumstances) be valid and binding.

The distinction between the effect of a deed under seal, and that of an agreement by parol, or by writing not under seal, may seem arbitrary, but it is established in our law; nor is it really unreasonable or practically inconvenient that the law should require particular solemnities to give to a gratuitous contract the force of a binding obligation. If the question be (as, in the actual state of the law, I think it is), whether consideration is, or is not, given in a case of this kind, by the debtor who pays down part of the debt presently due from him, for a promise by the creditor to relinquish, after certain further payments on account, the residue of the debt, I cannot say that I think consideration is given, in the sense in which I have always understood that word as used in our law. It might be (and indeed I think it would be) an improvement in our law, if a release or acquittance of the whole debt, on payment of any sum which the creditor might be content to receive by way of accord and satisfaction (though less than the whole), were held to be, generally, binding, though not under seal; nor should I be unwilling to see equal force given to a prospective agreement, like the present, in writing though not under seal; but I think it impossible, without refinements which practically alter the sense of the word, to treat such a release or acquittance as supported by any new consideration proceeding from the debtor. All the authorities subsequent to *Cumber v. Wayne*,² which were relied upon by the appellant at your Lordships' Bar (such as *Sibree v. Tripp*,³ *Curlewis v. Clark*,⁴ and *Goddard v. O'Brien*⁵) have proceeded upon the distinction, that, by giving

¹ 5 Rep. 117*a*.

⁴ 3 Ex. 375.

² 1 Sm. L. C. 8th ed. 366.

⁵ 9 Q. B. D. 37.

³ 15 M. & W. 23.

negotiable paper or otherwise, there had been some new consideration for a new agreement, distinct from mere money payments in or toward discharge of the original liability. I think it unnecessary to go through those cases, or to examine the particular grounds on which each of them was decided. There are no such facts in the case now before your Lordships. What is called "any benefit, or even any legal possibility of benefit," in Mr. Smith's notes to *Cumber v. Wane*,¹ is not (as I conceive) that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length, or possibly become insolvent, but is some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration for any other sort of agreement not under seal.

My conclusion is, that the order appealed from should be affirmed, and the appeal dismissed, with costs, and I so move your Lordships.

LORD BLACKBURN. My Lords, the first question raised is as to what was the true construction of the memorandum of agreement made on December 21st, 1876. What was it that the parties by that writing agreed to?

The appellants contend that they meant that on payment down of £500, and payment within a month after July 1st and January 1st in each ensuing year of £150, until the sum of £2090 19s. was paid, the judgment for that sum and interest should be satisfied, for an agreement to take no proceedings on the judgment is equivalent to treating it as satisfied. This construction of the memorandum requires that after the tenth payment of £150 there should be a further payment of £90 19s. made within the next six months. This is the construction which all three Courts below have put upon the memorandum.

The respondent contends that the true construction of the memorandum was that time was to be given on those conditions for five years, the judgment being on default of any one payment enforceable for whatever was still unpaid, with interest from the date the judgment was signed, but that the interest was not intended to be forgiven at all.

If this is the true construction of the agreement the judgment appealed against is right and should be affirmed, whether the reason on which the Court of Appeal founded its judgment was right or not. I am, however, of opinion that the Courts below, who on this point were unanimous, put the true construction on the memorandum. I do not think the question free from difficulty. It would have been easy to have expressed, in un-

¹ 1 Sm. L. C. 8th ed. 366.

mistakable words, that on payment down of £500, and punctual payment at the rate of £300 a year till £2090 19s. was paid, the judgment should not be enforced either for principal or interest; or language might have been used which should equally clearly have expressed that, though time was to be given, interest was to be paid in addition to the instalments. The words actually used are such that I think it is quite possible that the two parties put a different construction on the words at the time; but I think the words "till the said sum of £2090 19s. shall have been fully paid and satisfied" cannot be construed as meaning "till that sum, with interest from the day judgment was signed, shall have been fully paid and satisfied," nor can the promise "not to take any proceedings whatever on the judgment" be cut down to meaning any proceedings except those necessary to enforce payment of interest.

I think, therefore, that it is necessary to consider the ground on which the Court of Appeal did base their judgment, and to say whether the agreement can be enforced. I construe it as accepting and taking £500 in satisfaction of the whole £2090 19s., subject to the condition that unless the balance of the principal debt was paid by the instalments, the whole might be enforced with interest. If, instead of £500 in money, it had been a horse valued at £500, or a promissory note for £500, the authorities are that it would have been a good satisfaction, but it is said to be otherwise as it was money.

This is a question, I think, of difficulty.

In Coke, Littleton 212*b*, Lord Coke says: "Where the condition is for payment of £20, the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because *it is apparent* that a lesser sum of money *cannot* be a satisfaction of a greater. . . . If the obligor or feoffor pay a lesser sum either before the day or at another place than is limited by the condition, and the obligee or feoffee receiveth it, this is a good satisfaction." For this he cites Pinnel's Case.¹ That was an action on a bond for £16, conditioned for the payment of £8 10s. on November 11th, 1600. Plea that defendant, at plaintiff's request, before the said day, to wit, on October 1st, paid to the plaintiff £5 2s. 2*d*., which the plaintiff accepted in full satisfaction of the £8 10s. The plaintiff had judgment for the insufficient pleading. But though this was so, Lord Coke reports that it was resolved by the whole Court of Common Pleas "that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be

¹ 5 Rep. 117*a*.

a satisfaction to the plaintiff for a greater sum ; but the gift of a horse, hawk, or robe, etc., in satisfaction is good, for it shall be intended that a horse, hawk, or robe, etc., might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole sum is due, by no intendment the acceptance of parcel can be a satisfaction to the plaintiff ; but in the case at bar it was resolved that the payment and acceptance of parcel before the day in satisfaction of the whole would be a good satisfaction in regard of circumstance of time ; for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material ; so if I am bound in £20 to pay you £10 at Westminster, and you request me to pay you £5 at the day at York, and you will accept it in full satisfaction for the whole £10, it is a good satisfaction for the whole, for the expenses to pay it at York is sufficient satisfaction."

There are two things here resolved. First, that where a matter paid and accepted in satisfaction of a debt certain might by any possibility be more beneficial to the creditor than his debt, the Court will not inquire into the adequacy of the consideration. If the creditor, without any fraud, accepted it in satisfaction when it was not a sufficient satisfaction it was his own fault. And that payment before the day might be more beneficial, and consequently that the plea was in substance good, and this must have been decided in the case.

There is a second point stated to have been resolved—viz.: "That payment of a lesser sum on the day cannot be any satisfaction of the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." This was certainly not necessary for the decision of the case ; but though the resolution of the Court of Common Pleas was only a dictum, it seems to me clear that Lord Coke deliberately adopted the dictum, and the great weight of his authority makes it necessary to be cautious before saying that what he deliberately adopted as law was a mistake, and though I cannot find that in any subsequent case this dictum has been made the ground of the decision, except in *Fitch v. Sutton*,¹ as to which I shall make some remarks later, and in *Down v. Hatcher*,² as to which Parke, B., in *Cooper v. Parker*,³ said: "Whenever the question may arise as to whether *Down v. Hatcher*⁴ is good law, I should have a great deal to say against

¹ 5 East, 230.

² 10 A. & E. 121.

³ 15 C. B. 828.

⁴ 10 A. & E. 121.

it," yet there certainly are cases in which great judges have treated the dictum in *Pinnel's Case*¹ as good law.

For instance, in *Sibree v. Tripp*,² Parke, B., says: "It is clear if the claim be a liquidated and ascertained sum, payment of part cannot be satisfaction of the whole, although it may, under certain circumstances, be evidence of a gift of the remainder." And Alderson, B., in the same case says: "It is undoubtedly true that payment of a portion of a liquidated demand, in the same manner as the whole liquidated demand which ought to be paid, is payment only in part, because it is not one bargain, but two—viz., payment of part, and an agreement without consideration to give up the residue. The Courts might very well have held the contrary, and have left the matter to the agreement of the parties, but undoubtedly the law is so settled." After such strong expressions of opinion, I doubt much whether any judge sitting in a Court of the first instance would be justified in treating the question as open. But as this has very seldom, if at all, been the ground of the decision even in a Court of the first instance, and certainly never been the ground of a decision in the Court of Exchequer Chamber, still less in this House, I did think it open in your Lordships' House to reconsider this question. And, notwithstanding the very high authority of Lord Coke, I think it is not the fact that to accept prompt payment of a part only of a liquidated demand, can never be more beneficial than to insist on payment of the whole. And if it be not the fact, it cannot be apparent to the judges.

I will first examine the authorities. If a defendant pleaded the general issue, the plaintiff could join issue at once; and if the case was not defended get his verdict at the next assizes. But by pleading a special plea, the plaintiff was obliged to reply, and the defendant often caused the plaintiff, merely by the delay occasioned by replying, to lose an assize. If the replication was one to which he could demur he made this sure. Strangely enough it seems long to have been thought that if the defendant kept within reasonable bounds, neither he nor his lawyers were to blame in getting time in this way by a sham plea—that a chattel was given and accepted in satisfaction of the debt. The recognized forms were giving and accepting in satisfaction a beaver hat. *Young v. Rudd*,³ or a pipe of wine.⁴ All this is now antiquated. But while it continued to be the practice, the pleas founded on the first part of the resolution in *Pinnel's Case*⁵ were very common, and that law was perfectly

¹ 5 Rep. 117*a*.

² 15 M. & W. 33, 37.

³ 5 Mod. 86.

⁴ 3 Chit. Plead. 7th ed. 92.

⁵ 5 Rep. 117*a*.

trite. No one for a moment supposed that a beaver hat was really given and accepted ; but every one knew that the law was that if it was really given and accepted it was a good satisfaction. But special pleas founded on the other resolution in Pinnel's Case,¹ on what I have ventured to call the dictum, were certainly not common. I doubt if a real defence of this sort was ever specially pleaded. When there really was a question as to whether a debt was satisfied by a payment of a smaller sum the defendant pleaded the general issue, and if it was proved to the satisfaction of the jury that a smaller sum had been paid and accepted in satisfaction of a greater, if objection was raised the jury might, perhaps, as suggested by Holroyd, J., in *Thomas v. Heathorn*,² find that the circumstances were such that the legal effect was to be as if the whole was paid down and a portion thrown back as a god's-penny. This, however, seems to me to be an unsatisfactory and artificial way of avoiding the effect of the dictum, and it could not be applied to such an agreement as that now before this House.

For whatever reason it was, I know of no case in which the question was raised whether a payment of a lesser sum could be satisfaction of a liquidated demand from Pinnel's Case³ down to *Cumber v. Wane*, 5 Geo. 1,⁴ a period of one hundred and fifteen years.

In *Adams v. Tapling*,⁵ where the plea was bad for many other reasons, it is reported to have been said by the Court that : " In covenant where the damages are uncertain, and to be recovered, as in this case, a lesser thing may be done in satisfaction, and there ' accord and satisfaction ' is a good plea." No doubt this was one of the cases which Parke, B., would have cited in support of his opinion that *Down v. Hatcher*⁶ was not good law. The Court are said to have gone on to recognize the dictum in Pinnel's Case,⁷ or at least not to dissent from it, but it was not the ground of their decision. In every other reported case which I have seen the question arose on a demurrer to a replication to what was obviously a sham or dilatory plea.

Some doubt has been made as to what the pleadings in *Cumber v. Wane*⁸ really were. I have obtained the record.⁹ The plea is that after the promises aforesaid, and before the issuing of the writ, it was agreed between the said George and Edward Cumber that he, the said George, "*daret eidem Edwardo Cumber quandam notam in script vocatam, a promissory note, manu propria*

¹ 5 Rep. 117a.⁵ 4 Mod. 88.⁹ The reference is :² 2 B. & C. 482.⁶ 10 A. & E. 121.

Queen's Bench (Plea side)

³ 5 Rep. 117a.⁷ 5 Rep. 117a.

Plea Roll. 5 Geo. 1, Trin-

⁴ 1 Sm. L. C. 8th ed. 357.⁸ 1 Str. 426.

ity, ro. 173.

ipsius Georgii subscript pr. solucōn eidem Edwardo Cumber vel ordinī quinque librarum," fourteen days after date, in full satisfaction and exoneration of the premises and promises, which said note in writing the said George then gave to the said Edward Cumber, and the said Edward Cumber then and there received from the said George the said note in full satisfaction and discharge of the premises and promises.

The replication is that "the said George did not give to him Edward any note in writing called a promissory note with the hand of him George subscribed for the payment to him Edward or his order of £5, fourteen days after date in full satisfaction and discharge of the premises and promises." To this there is a demurrer and judgment in the Common Pleas for the plaintiff "that the replication was good in law."

The reporter, oddly enough, says there was an immaterial replication. The effect of the replication is to put in issue the substance of the defence—namely, the giving in satisfaction; *Young v. Rudd*,¹ and certainly that was not immaterial. But for some reason, I do not stop to inquire what, Pratt, C.J., prefers to base the judgment affirming that of the Common Pleas on the supposed badness of the plea rather than on the sufficiency of the replication. It is impossible to doubt that the note, which it is averred in the plea was given as satisfaction, was a negotiable note. And therefore this case is in direct conflict with *Sibree v. Tripp*.²

Two cases require to be carefully considered. The first is *Heathcote v. Crookshanks*.³ The plea there pleaded would, I think, now be held perfectly good, see *Norman v. Thompson*; but Buller, J., seems to have thought otherwise. He says: "Thirdly, it was said that all the creditors were bound by this agreement to forbear, but that is not stated by the plea. It is only alleged that they agreed to take a certain proportion, but that is a *nudum pactum*, unless they had afterward accepted it. In the case in which *Cumber v. Wane*⁴ was denied to be law, *Hardcastle v. Howard* (26 Geo. 3, B.R.), the party actually accepted. But as the plaintiff in the present case refused to take less than the whole demand, the plea is clearly bad."

That decision goes entirely on the ground that accord without satisfaction is not a plea. I do not think it can be fairly said that Buller, J., meant by saying "that is a *nudum pactum*, unless they had afterward accepted it," to express an opinion that if the dividend had been accepted it would have been a good satisfaction. But he certainly expresses no opinion the other way.

¹ 5 Mod. 86.² 15 M. & W. 23.³ 2 T. R. 24.⁴ 4 Ex. 755.⁵ 1 Str. 426.

In *Fitch v. Sutton*¹ not only did the plaintiff not accept the payment of the dividend in satisfaction, but refused to accept it at all, unless the defendant promised to pay him the balance when of ability, and the defendant assented and made the promise required, so that but for the fact that other creditors were parties to the composition there could have been no defence. There was no point of pleading in that case, the whole being open under the general issue. And in *Steinman v. Magnus*² it was pretty well admitted by Lord Ellenborough that the decision in *Fitch v. Sutton*³ would have been the other way, if they had understood the evidence as the reporter did. But though this misapprehension of the judges as to the facts, and the absence of any acceptance of the dividend, greatly weaken the weight of *Fitch v. Sutton*,⁴ still it remains that Lord Ellenborough, a very great judge indeed, did, however hasty or unnecessary it may have been to express such an opinion, say: "It is impossible to contend that acceptance of £17 10s. is an extinguishment of a debt of £50. There must be some consideration for the relinquishment of the residue; something collateral, to show a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*. But the mere promise to pay the rest when of ability put the plaintiff in no better condition than he was before. It was expressly determined in *Cumber v. Wane*⁵ that acceptance of a security for a lesser sum cannot be pleaded in satisfaction of a similar security for a greater. And though that case was said by me in argument in *Heathcote v. Crookshanks*⁶ to have been denied to be law, and in confirmation of that Buller, J., afterward referred to a case (stated to be that of *Hardcastle v. Howard* (H. 26 Geo. 3), yet I cannot find any case of that sort, and none has been now referred to; on the contrary, the decision in *Cumber v. Wane*⁷ is directly supported by the authority of *Pinnel's Case*,⁸ which never appears to have been questioned."

I must observe that, whether *Cumber v. Wane*⁹ was, or was not denied to be law in *Hardcastle v. Howard*, it certainly was denied to be law in *Sibree v. Tripp*,¹⁰ and that, though it is quite true that *Pinnel's Case*,¹¹ as far as regards the points actually raised in the case, has not only never been questioned, but is often assented to, I am not aware that in any case before *Fitch v. Sutton*,¹² unless it be *Cumber v. Wane*,¹³ has that part of it which

¹ 5 East, 230.⁶ 2 T. R. 24.¹⁰ 15 M. & W. 23.² 11 East, 390.⁷ 1 Str. 426.¹¹ 5 Rep. 117a.³ 5 East, 230.⁸ 5 Rep. 117a.¹² 5 East, 230.⁴ *Ibid.*⁹ 1 Str. 426.¹³ 1 Str. 426.⁵ 1 Str. 426.

I venture to call the dictum ever been acted upon; and as I have pointed out, had it not been for the composition with other creditors, there could have been no defence in *Fitch v. Sutton*,¹ whether the dictum in *Pinnel's Case*² was right or wrong.

Still this is an authority, and I have no doubt that it was on the ground of this authority and the adhesion of Bayley, J., to it in *Thomas v. Heathorn*,³ that Barons Parke and Alderson expressed themselves as they did in the passages I have cited from *Sibree v. Tripp*.⁴ And I think that their expressions justify Mr. John William Smith in laying it down as he does in his note to *Cumber v. Wane*,⁵ in the second edition of his *Leading Cases*, that "a liquidated and undisputed money demand, of which the day of payment is passed (not founded upon a bill of exchange or promissory note), cannot even with the consent of the creditor be discharged by mere payment by the debtor of a smaller amount in money in the same manner as he was bound to pay the whole." I am inclined to think that this was settled in a Court of the first instance. I think, however, that it was originally a mistake.

What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognize and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so. I had persuaded myself that there was no such long-continued action on this dictum as to render it improper in this House to reconsider the question. I had written my reasons for so thinking; but as they were not satisfactory to the other noble and learned Lords who heard the case, I do not now repeat them nor persist in them.

I assent to the judgment proposed, though it is not that which I had originally thought proper.⁶

Order appealed from affirmed, and appeal dismissed with costs.

¹ 5 East, 230.

² 5 Rep. 117*a*.

³ 2 B. & C. 477.

⁴ 15 M. & W. 23.

⁵ 1 Str. 426.

⁶ The concurring opinions of Lords Fitzgerald and Watson have been omitted.—ED.

BIDDER v. BRIDGES.

IN THE COURT OF APPEAL, DECEMBER 20, 1887.

[*Reported in Law Reports, 37 Chancery Division 406.*]

THE action in this case was brought for the purpose of establishing certain rights of common.

The action was tried before Kay, J., who gave judgment on October 27th, 1885, in favor of the defendants with costs. The plaintiffs appealed from this judgment, and the appeal was dismissed with costs on August 2d, 1886.

The costs of the judgment and the appeal were taxed, and the certificates of the Taxing Master were given on May 27th, 1887, from which it appeared that the amount of the taxed costs of the judgment payable to the defendant, H. Davis, was £465 17s. 10d., and of the taxed costs of the appeal, £144 7s. 4d.

Mr. C. A. Russ was the solicitor acting for H. Davis in the action, and he was prepared to file the certificates when he received a letter from Messrs. Rooke & Sons, the solicitors for the plaintiffs, asking him to call on them to settle the costs, and not to put his clients to the expense of filing the certificates.

Mr. Norris, the managing clerk of Mr. Russ, accordingly called on Messrs. Rooke & Sons, on May 28th, 1887, when Mr. F. H. Rooke handed him a check for £609 5s. 2d., being the amount of the taxed costs of the judgment and appeal, less £1, which was deducted on account of the certificates not being filed. Mr. Norris then signed receipts for the costs, which were endorsed upon the certificates, and he then handed over the certificates to Mr. F. H. Rooke. The form of the receipt on the certificate of the costs of the judgment was as follows :

“ Received by check the within-mentioned costs of £465 17s. 10d., less 10s., remitted.

“ CHARLES A. RUSS.—H. G. N.”

And a similar receipt was given for the costs of the appeal. The check was drawn by Rooke & Sons in favor of C. A. Russ, Esq., or order, and was duly paid.

Mr. Rooke in his affidavit stated that he objected to pay for the filing of the certificates on the ground that they had been taken out without giving notice to his firm of the final appointment to dispose of certain outstanding queries and in their absence, and also on the ground that filing the certificates was an unnecessary expense ; and that he gave the check in full satis-

faction of all Davis's claims against the plaintiffs under the certificates. Mr. Norris, however, made a counter affidavit stating that all the queries were finally disposed of in the presence of a representative of Messrs. Rooke & Sons. Nothing was said at the time about interest on the costs, but on July 11th, 1887, Mr. Russ wrote a letter to Messrs. Rooke & Sons, in which he said : " When you handed me check for the amount of taxed costs you omitted to include interest on the respective certificates. This interest, calculated at 4 per cent from the respective dates of the judgment and appeal, must be paid in the usual way, and I should be obliged by your procuring and handing me a check for £33 16s. 7*d.*, the amount of interest as aforesaid." Messrs. Rooke & Sons having declined to pay the interest claimed, Mr. Russ wrote to them to return the certificates in order that they might take further proceedings on them ; and enclosed in their place a separate receipt for the money which had been paid. Messrs. Rooke & Sons refused to give up the certificates, and the defendant Davis then moved before Stirling, J., that the plaintiffs be ordered to file, or to attend before the proper officer of the Court, and produce to such officer the certificates of the Taxing Master of May 27th, 1887, for the purpose of enabling the defendant Davis to issue a writ of *fi. fa.* for the interest on the costs thereby certified and due from the plaintiffs to Davis.

The motion came on for hearing before Stirling, J., on November 18th, 1887.

H. Terrell for the motion.

W. Pearson, Q.C., for the plaintiffs.

STIRLING, J. This is an application of a very unusual character. The notice of motion is [his Lordship read it and continued] : It appears that the action of *Bidder v. Bridges* was dismissed by Kay, J., with costs to be paid to all the defendants, including Henry Davis. The decision was affirmed by the Court of Appeal, and again the plaintiffs were ordered to pay the costs. The costs have been taxed in pursuance of the orders. What has taken place since is in evidence in the affidavit of the clerk of the solicitor who acted for the defendant Davis, and who had the conduct of the taxation. It is to the effect that the costs were duly taxed at £465 17s. 10*d.*, and £144 7s. 4*d.*, making together £610 5s. 2*d.* [His Lordship read the letters which passed between the solicitors in May, 1887, and continued.] Upon the affidavits there is to a certain extent a conflict of evidence. Possibly, in one view, that conflict may be immaterial, but if there should be further litigation it may be material. It is plain, however, that there was a dis-

cussion about the amount to be paid. The solicitor for the plaintiffs insisted upon a reduction of £1 being made in reference to the filing of the certificates—it having been agreed that they should not be filed ; and he also insisted that the clerk of the defendant's solicitor should take his check for the reduced amount ; and to my mind, as the matter then stood, the meaning of both parties was that if the check should be honored it was to be taken in payment for the bills of costs. That is not in dispute, whatever may be the legal effect of the transaction. The check was honored. It has the endorsement of the defendant's solicitor upon it. Then according to the evidence of that solicitor's clerk he discovered a week or two afterward that the interest had been omitted to be charged. That is an incorrect statement, because when he went to the plaintiffs' solicitors' office he knew that the interest was not included in the amount to be paid. What he did discover was a decision of the Court of Appeal showing that the defendant might claim interest, and hence this motion.

In the first place it was contended that I have no jurisdiction to make the order asked for. I do not think it necessary to go into that question, but I am not prepared to say that in a proper case I have not jurisdiction. If I found that one solicitor had by fraud or trickery got from another a document which ought to be filed, and if by its not being filed he might be deprived of his just rights, I would try to see whether it could not be placed upon the files of the Court ; but that is not this case. This was a perfectly plain, honest, and honorable transaction upon both sides. In regard to it the plaintiffs have obtained an advantage honorably got, and why should I take it away from them ? It is plain that the certificates were not to be filed, and as plain that it was competent to the parties to enter into such an arrangement ; if any mistake was made, it was a mistake of law, and therefore I do not see why the advantage gained should be taken from the plaintiffs. The agreement being clear that the certificates should not be filed, I do not think that I ought to interfere. If there be any other remedy open to the defendant he can pursue it. Possibly that is enough to dispose of the motion. If, however, there be jurisdiction, and I am to exercise it, I must be clear that the law is in favor of the applicant. The object in view is to have the certificates filed so that the applicant may immediately afterward proceed to obtain the interest. The dispute between the parties in regard to the check being given, is shown in the evidence, which is oath against oath and nothing more, and all that I could do, if I made an order, would be to put the matter in such a position as that the

defendant should obtain a decision upon the conflict of evidence ; but why should I put the plaintiffs, who have got an advantage, to a disadvantage, to which they ought not to be exposed ? After the arguments I may be justified in seeing whether the authorities are in favor of the applicant. What was done by the applicant ? He accepted, as it appears to me, in full satisfaction of the plaintiffs' liability for costs, the check of their solicitors payable to order, and that check was duly honored. What in law is the effect of that ? The state of the law is very peculiar in regard to the acceptance of a smaller sum in satisfaction of a larger debt. The law has been recently discussed in the case of *Foakes v. Beer*,¹ the head-note of which states that "an agreement between judgment debtor and creditor, that in consideration of the debtor paying down part of the judgment debt and costs, and on condition of his paying to the creditor or his nominee the residue by instalments, the creditor will not take any proceedings on the judgment, is *nudum pactum*, being without consideration, and does not prevent the creditor after payment of the whole and costs from proceeding to enforce payment of the interests upon the judgment." That decision was founded upon the doctrine laid down so long ago as *Pinnel's Case*,² and it will be sufficient for my purpose here if I refer to what Lord Blackburn said in his speech as to that case :³ "That was an action on a bond for £16 conditioned for the payment of £8 10s. on November 11th, 1600. Plea that defendant, at plaintiff's request, before the said day, to wit, on October 1st, paid to the plaintiff £5 2s. 2*d.* which the plaintiff accepted in full satisfaction of the £8 10s. The plaintiff had judgment for the insufficient pleading," and his Lordship went on to state that Lord Coke reports that the Court resolved "that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole . . . but the gift of a horse, hawk, or robe, etc., in satisfaction is good, for it shall be intended that" either "might be more beneficial to the plaintiff than the money ;" and after referring further to that case Lord Blackburn said : "There are two things here resolved. First, that where a matter paid and accepted in satisfaction of a debt certain might by any possibility be more beneficial to the creditor than his debt, the Court will not inquire into the adequacy of the consideration." And, secondly, "that payment of a lesser sum on the day cannot be any satisfaction of the whole." There were, therefore, two resolutions in *Pinnel's Case*, and the decision of the House of Lords affirmed the second ; but, as I

¹ 9 App. Cas. 605.² 5 Rep. 117*a* ; Co. Litt. 212*b*.³ 9 App. Cas. 615.

understand that decision, it did not in any way disaffirm the other. Therefore the first resolution referred to by Lord Blackburn is just as much binding on me as the second. Then comes the question here, Is a negotiable instrument such a matter as may be "paid and accepted in satisfaction of a debt certain?" The applicant accepted not a negotiable instrument of his debtors, but that of their solicitors. He took the check of different persons. Was that an accord and satisfaction according to the authorities? No doubt the case of *Cumber v. Wane*¹ was one in reference to a promissory note. In *Foakes v. Beer*² the record of *Cumber v. Wane* is fully stated at page 619. The decision was that giving a promissory note for £5 cannot be pleaded as a satisfaction for £15, but this has been denied by a series of authorities to be law. Thus in *Sibree v. Tripp*³ it was held that a promissory note taken for a less sum than the demand was a good satisfaction; that a negotiable instrument for a smaller sum may be given in satisfaction of a larger debt. Then there is the case of *Curlewis v. Clark*,⁴ and also that of *Goddard v. O'Brien*,⁵ which goes even further than I am required to go in this case. It was contended that these three authorities went upon the view that *Cumber v. Wane*⁶ was bad law, and that this was inconsistent with the decision in *Foakes v. Beer*.⁷ I do not, however, understand the House of Lords to approve of the application made in *Cumber v. Wane* of the doctrine laid down in *Pinnel's Case*.⁸ In that case there was a qualification added that if a thing of a different kind be given, that is a good satisfaction. That qualification was disregarded in *Cumber v. Wane*; and in *Foakes v. Beer* this circumstance is commented upon by both Earl Selborne and Lord Blackburn. If further authority is required I may refer to the notes of the late Willes, J., and of Keating, J., to the case of *Cumber v. Wane* in Smith's *Leading Cases*, where they state the law to be that a demand may be discharged by payment of a thing different from that contracted to be paid though of less pecuniary value, and they give as an instance a negotiable instrument binding the debtor or a third person to pay a smaller sum. Under these circumstances, having regard to the current of authorities, which appear to me to be unaffected by the decision of the House of Lords, I hold that the check of a third party given as this check was, was a satisfaction of the debt and

¹ 1 Str. 426; 1 Sm. L. C. 8th ed. p.

357.

² 9 App. Cas. 605.

³ 15 M. & W. 23.

⁴ 3 Ex. 375.

⁵ 9 Q. B. D. 37.

⁶ 1 Str. 426; 1 Sm. L. C. 8th ed. p.

357.

⁷ 9 App. Cas. 605.

⁸ 5 Rep. 117a; Co. Litt. 212b.

was a good payment. Therefore, both as to the form and upon the merits, the application fails and must be refused with costs.

From this decision the defendant Davis appealed.

H. Terrell for the appellant.

W. Pearson, Q.C., and *Bray* for the plaintiffs were not called on.

COTTON, L.J. This is an appeal from a decision of Stirling, J., who refused the application now brought before us again on appeal. The application itself is of a somewhat curious character, though I will not myself rely on the particular terms of it. It is asking that a gentleman to whom the appellant has delivered up certificates of the Taxing Master should be ordered to produce them in order that the appellant may make them effectual against the clients of the solicitor, who were the plaintiffs in the action, in order to get interest on his costs.

It appears that there was an order made for the plaintiffs to pay the costs. There were two certificates of the Master, one for the costs in the Court below, the other for the costs in the Court of Appeal, and when the certificates were obtained, but before they were filed, the solicitor acting for the plaintiffs very reasonably wrote and sent to the solicitor of the defendant a letter asking him not to incur the expense of filing the certificates; and I think also he made some suggestion that he might dispute the amount for which the costs were to be taxed. However, the defendant's solicitor called on him, and then the plaintiffs' solicitor paid him with his own check the amount of each of the certificates, less 10*s.* It is said by the defendant that that 10*s.* was taken off in order to remove the item for filing the certificate. Whether that is so or not is immaterial. The sum was taken off, and on the check being handed over by the plaintiffs' solicitor, the defendant's solicitor handed over to the plaintiffs' solicitor those two certificates with receipts endorsed on them.

Now what we have to consider is this, what was the agreement entered into on that occasion? and, secondly, was there any consideration for it? Now, in my opinion, the agreement is clear. It is very true that the endorsement upon the certificates is in this form: "Received by check the within mentioned costs, £609 5*s.* 2*d.*, less 10*s.* remitted." The amount of course being different on the two certificates. What was the meaning of that? It was not necessary that the agreement should be in writing. The meaning was that the defendant's solicitor should give up all his claim, whatever it was, under those certificates on receiving from the plaintiffs' solicitor the check for the amount mentioned in the two certificates. It is said he never intended to give up any interest. I quite believe he did not

know anything about interest then, or think that he was entitled to it ; but if, in fact, he was entitled to interest on these certificates at the date of the judgment, and gave up all his claim under the certificates, then, in my opinion, he gave up, if there was good consideration, all those matters which he could, without anything further, obtain on those certificates, even though he did not know the law which would give him interest. Of course ignorance of general law will not excuse any man when he enters into an agreement.

But it is said that our decision to that effect would be a contradiction of *Foakes v. Beer*.¹ If so, that is a decision of the House of Lords, and we must follow it, though I must say for myself that where the House of Lords has come to a particular construction on an instrument, I should not feel myself bound to follow their decision by putting a construction on a different instrument which I did not think the correct construction of that instrument. We must follow of course the rules which they lay down in order to decide what is to be the principle of construction. All that Earl Selborne decided there (and none of the other Lords who delivered their opinions differed from it) was that, looking at the words of the agreement, which was reduced into writing in that case, one could only take it as an agreement to receive the sum of money and the instalments therein mentioned, in consideration of the principal sum which was due, and nothing more ; and that to give it a different construction would be to add to that written agreement, which apparently fully expressed the intention of the parties, words which were not there—namely, “interest on those sums.” That is an entirely different matter. What is the agreement between the parties as shown by their acts ? In my opinion the agreement was here to give up all claim in respect to the matters mentioned in the certificates—that is, in respect of those certificates.

But then we come to another point which was entered into very fully by Stirling, J. Was there a consideration ? Now I think the law is generally reasonable, but whether *Cumber v. Wane*² was reasonable we have not to consider. There is a qualification of the rule there laid down by judges (whose decisions we ought not to disregard here), by making exceptions which will reduce that case to something like principle. They lay down this, that though the payment of a smaller sum cannot be a good consideration for accord and satisfaction of a claim for a larger one, yet if there is anything which can be a new consideration and a new benefit to the person entitled to

¹ 9 App. Cas. 605.

² 1 Str. 426.

the larger sum, that will do ; and the only thing we have to consider is whether here in this case there was anything which could be a new consideration, that is some new and different benefit to the person entitled to the larger sum of money. Those cases which I have mentioned go particularly to this, that if there is a promissory note, a negotiable instrument, for a smaller sum, that may do. The first of those cases relied upon on this point goes to this, that even if it is a promissory note signed by the person who is liable for the larger sum, that will do. But here that is not the case. Here the solicitor himself gives his check for this amount. It is very true he was paying it on behalf of his client, but not paying it so as to make his act in signing that check the act of his client. He gave the check and became personally responsible for it, though, undoubtedly, he had a right of indemnity as against his client to be paid by him whatever he might pay on that promissory note. That being so, in my opinion, having regard to the cases which have qualified *Cumber v. Wane*,¹ and not inconsistently with *Foakes v. Beer*,² we are justified in holding that there was sufficient consideration for the agreement between the solicitor of the defendant and the solicitor of the plaintiffs to support the contract to which I have referred. In my opinion the appeal fails.

LINDLEY, L.J. I am of the same opinion. The application to the Court is that the Court may order the plaintiffs to produce to a proper officer of the Royal Courts certain certificates of the Taxing Master for the purpose of enabling the appellant to issue a writ of execution or *fi. fa.* When you come to look at the substance of the thing it is rather curious. The action of *Bidder v. Bridges* having been dismissed with costs, Mr. Davis, who was one of the defendants, was entitled to receive his costs, and the costs were taxed, and on May 28th, 1887, Mr. Davis's solicitor met the plaintiffs' solicitor, and then the plaintiffs' solicitor gave Mr. Davis's solicitor a check for Mr. Davis's costs, and upon that occasion it was agreed that the certificates should not be filed. There was some little expense about it which it was wished to avoid.

We are asked to undo that transaction, and to compel the plaintiffs' solicitor, who has got these certificates under that arrangement, to produce them, in order that further steps may be taken upon them, and that interest may be obtained. What legal ground is there for interfering at all? In other words, upon what principle should the Court order the plaintiffs' solicitor to produce these documents? He has got them fairly and properly pursuant to an agreement. There has been no fraud,

¹ 1 Str. 426.

² 9 App. Cas. 605.

no trick, no concealment, nor anything of the kind. When you come to sift it, the ground must be reduced to this, that Mr. Russ forgot all about the interest. Is that enough? Is not that precisely relying upon a mistake in law for further relief where there is no equitable element as distinguished from legal? Looking at the matter in that way it seems to me there is no ground in point of law for this application at all. I am not going to spend time in discussing Pinnel's Case,¹ and *Cumber v. Wane*,² and that class of case. It appears to me that, for the reasons given by Cotton, L.J., we are outside those cases, and I have looked at the matter apart from all technicalities. It strikes me this is an attempt without any sufficient ground to undo a *bona fide* settlement, and I think the appeal ought to be dismissed with costs.

LOPES, L.J. I take it the law is quite clear that the payment of a smaller sum cannot be pleaded as accord and satisfaction to a claim for a larger sum; it is only a payment *pro tanto*. In *Cumber v. Wane* it was laid down that giving a promissory note for £5 could not be pleaded as accord and satisfaction where the claim was for a debt of £15, but that decision was modified by the case of *Sibree v. Tripp*,³ where it was held that a negotiable security may operate, if so given and taken, in satisfaction of a debt of greater amount; the circumstance of negotiability making it, in fact, a different thing and more advantageous than the original debt, which was not negotiable.

Now it is also law that the giving of a negotiable instrument for a smaller sum by a third party would support accord and satisfaction. The principle which runs through all the cases is this, that there is a possibility of a benefit accruing to the creditor which is the consideration, for the relinquishment of the residue of the debt.

Now, applying that principle to the present case, I think here that the certificates were given up, and the check taken upon an understanding that all other claim was relinquished and given up. We must look at the intention of the parties at the time. According to my view, that was their then intention. In point of fact, they neither of them thought of the interest, and they intended at that time that what was then done should put an end to all the claims arising from that judgment. It so happens that since that a case has been decided which has brought to the attention of the applicant here that he might have claimed interest on his costs; but he cannot now turn round and make that claim. I think the decision of *Stirling, J.*, was quite right.

¹ 5 Rep. 117*a*.

² 1 Str. 426.

³ 15 M. & W. 23.

EDWARD S. JAFFRAY ET AL., RESPONDENTS, v. SEIG-
FRIED DAVIS ET AL., APPELLANTS.

IN THE COURT OF APPEALS OF NEW YORK, JANUARY 14, 1891.

[*Reported in 124 New York Reports 164.*]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 21st, 1888, which affirmed a judgment in favor of plaintiff entered upon a decision of the Court on trial without a jury.

This was an action to recover a balance claimed to be due upon an indebtedness.

The facts, so far as material, are stated in the opinion.

O. F. Wisner for appellants.

Isaac L. Miller for respondents.

POTTER, J. The facts found by the trial Court in this case were agreed upon. They are simple and present a familiar question of law. The facts are that defendants were owing plaintiffs on December 8th, 1886, for goods sold between that date and the May previous at an agreed price, the sum of \$7714.37, and that on the 27th of the same December the defendants delivered to the plaintiffs their three promissory notes, amounting in the aggregate to \$3462.24, secured by a *chattel mortgage* on the stock, fixtures, and other property of defendants, located in East Saginaw, Mich., which said notes and chattel mortgage were received by plaintiffs under an agreement to accept same in full satisfaction and discharge of said indebtedness. "That said notes have all been paid and said mortgage discharged of record."

The question of law arising from these facts and presented to this Court for its determination is whether such agreement, with full performance, constitutes a bar to this action, which was brought after such performance to recover the balance of such indebtedness over the sum so secured and paid.

One of the elements embraced in the question presented upon this appeal is—viz., whether the payment of a sum less than the amount of a liquidated debt under an agreement to accept the same in satisfaction of such debt forms a bar to the recovery of the balance of the debt. This single question was presented to the English Court in 1602, when it was resolved (if not decided) in *Pinnel's Case* (5th Co. R. 117), "that payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole," and that this is so, although it was agreed that such payment should satisfy the whole. This sim-

ple question has since arisen in the English courts and in the courts of this country in almost numberless instances, and has received the same solution, notwithstanding the courts, while so ruling, have rarely failed, upon any recurrence of the question, to criticise and condemn its reasonableness, justice, fairness, or honesty. No respectable authority that I have been able to find has, after such unanimous disapproval by all the courts, held otherwise than was held in Pinnel's Case (*supra*) and Cumber v. Wane (1 Str. 426); Foakes v. Beer (L. R. [9 App. Cas.] 605; 36 English Reports, 194); Goddard v. O'Brien (L. R. [9 Q. B. Div.] 37; Vol. 30, Am. Law Register, 637, and notes).

The steadfast adhesion to this doctrine by the *courts* in spite of the current of condemnation by the individual judges of the *Court*, and in the face of the demands and conveniences of a much greater business and more extensive mercantile dealings and operations, demonstrate the force of the doctrine of *stare decisis*. But the doctrine of *stare decisis* is further illustrated by the course of judicial decisions upon this subject, for while the courts still hold to the doctrine of the Pinnel and Cumber and Wane cases (*supra*), they have seemed to seize with avidity upon any consideration to support the agreement to accept the lesser sum in satisfaction of the larger, or, in other words, to extract, if possible, from the circumstances of each case a consideration for the new agreement, and to substitute the new agreement in place of the old, and thus to form a defence to the action brought upon the old agreement. It will serve the purpose of illustrating the adhesion of the Court to settled law, and at the same time enable us perhaps more satisfactorily to decide whether there was a good consideration to support the agreement in this case, to refer to the consideration in a few of the numerous cases which the courts have held to be sufficient to support the new agreement.

Lord Blackburn said in his opinion in Foakes v. Beer (*supra*), and while maintaining the doctrine "that a lesser sum cannot be a satisfaction of a greater sum," "but the gift of a horse, hawk, or robe, etc., in satisfaction is good," quite regardless of the amount of the debt. And it was further said by him in the same opinion "that payment and acceptance of a parcel before the day of payment of a larger sum would be a good satisfaction in regard to the circumstance of time," "and so if I am bound in £20 to pay you £10 at Westminster, and you request me to pay you £5 at the day at York, and you will accept it in full satisfaction for the whole £10, it is a good satisfaction." It was held in Goddard v. O'Brien (L. R. [9 Q. B.

Div.] 37; 21 Am. L. Reg. [N. S.] 637) "A. being indebted to B. in £125 7*s.* 9*d.* for goods sold and delivered, gave B. a check (negotiable, I suppose) for £100 payable on demand, which B. accepted in satisfaction, was a good satisfaction." Huddleston, B., in *Goddard v. O'Brien* (*supra*), approved the language of the opinion in *Sibree v. Tripp* (15 M. & W. 26), "that a negotiable security may operate, if so given and taken, in satisfaction of a debt of a greater amount; the circumstance of negotiability making it, in fact, a different thing and more advantageous than the original debt, which was not negotiable."

It was held in *Bull v. Bull* (43 Conn. 455), "and although the claim is a money demand liquidated and not doubtful, and it cannot be satisfied with a smaller sum of money, yet if any other personal property is received in satisfaction, it will be good no matter what the value."

And it was held in *Cumber v. Wane* (*supra*), that a creditor can never bind himself by simple agreement to accept a smaller sum in lieu of an ascertained debt of a larger amount, such agreement being *nudum pactum*, but if there be any benefit or even any legal possibility of benefit to the creditor thrown in, that additional weight will turn the scale and render the consideration sufficient to support the agreement.

It was held in *La Page v. McCrea* (1 Wend. 164), and in *Boyd v. Hitchcock* (20 Johns. 76), that "giving further security for part of a debt or other security, though for a less sum than the debt and acceptance of it in full of all demands, make a valid accord and satisfaction."

That "if a debtor gives his creditor a note endorsed by a third party for a less sum than the debt (no matter how much less), but in full satisfaction of the debt, and it is received as such, the transaction constitutes a good accord and satisfaction." (*Varney v. Commey*, 3 East, 25.) And so it has been held "where by mode or time of part payment, different than that provided for in the contract, a new benefit is or may be conferred or a burden imposed, a new consideration arises out of the transaction and gives validity to the agreement of the creditor" (*Rose v. Hall*, 26 Conn. 392), and so if "payment of less than the whole debt, if made before it is due or at a different place from that stipulated, if received in full, is a good satisfaction." (*Jones v. Bullitts*, 2 Lit. 49; *Ricketts v. Hall*, 2 Bush. 249; *Smith v. Brown*, 3 Hawks. [N. C.] 580; *Jones v. Perkins*, 29 Miss. 139; *Schweider v. Lang*, 29 Minn. 254; 43 Am. R. 202.)

In *Watson v. Elliott* (57 N. H. 511-513), it was held, "it is enough that something substantial, which one party is not

bound by law to do, is done by him or something which he has a right to do he abstains from doing at the request of the other party, is held a good satisfaction."

It has been held in a number of cases that if a note be surrendered (by the payee to the maker), the whole claim is discharged and no action can afterward be maintained on such instrument for the unpaid balance. (*Ellsworth v. Fogg*, 35 Vt. 355; *Kent v. Reynolds*, 8 Hun, 559.)

It has been held that a partial payment made to another, though at the creditor's instance and request, is a good discharge of the whole debt. (*Harper v. Graham*, 20 Ohio, 106.) "The reason of the rule is that the debtor in such case has done something more than he was originally bound to do or at least something different. It may be more or it may be less, as a matter of fact."

It was held by the Supreme Court of Pennsylvania in *Mechanics' Bank v. Houston* (February 13th, 1882, 11 W. Note, case 389), "The decided advantage which a creditor acquires by the receipt of a negotiable note for a part of his debt, is by the increased facilities of recovering upon it, the presumption of a consideration for it, the ease of disposing of it in market," etc., was held to furnish ample reason why it should be a valid discharge of a larger account or open claim unnegotiable.

It has been held that a payment in advance of the time if agreed to is full satisfaction for a larger claim not yet due. (*Brooks v. White*, 2 Met. 283; *Bowker v. Childs*, 3 Allen, 434.)

In some States, notably Maine and Georgia, the legislature, in order to avoid the harshness of the rule under consideration, have by statute changed the law upon that subject by providing, "no action can be maintained upon a demand which has been cancelled by the receipt of any sum of money less than the amount legally due thereon, or for any good and valuable consideration, however small." (Citing *Weymouth v. Babcock*, 42 Maine, 42.)

And so in *Gray v. Barton* (55 N. Y. 68), where a debt of \$820 upon book account was satisfied by the payment of \$1 by calling the balance a gift, though the balance was not delivered except by fiction, and the receipt was in the usual form and was silent upon the subject of a gift, and this case was followed and referred to in *Ferry v. Stephens* (66 N. Y. 321).

So it was held in *Mitchell v. Wheaton* (46 Conn. 315; 33 Am. R. 24), that the debtor's agreement to pay and the payment of \$150 with the costs of the suit upon a liquidated debt of \$299 satisfied the principal debt.

These cases show in a striking manner the extreme ingenuity and assiduity which the courts have exercised to avoid the operation of the "rigid and rather unreasonable rule of the old law," as it is characterized in *Johnston v. Brannan* (5 Johns. 268-272), or as it is called in *Kellogg v. Richards* (14 Wend. 116), "technical and not very well supported by reason," or, as may be more practically stated, a rule that "a bar of gold worth \$100 will discharge a debt of \$500, while 400 gold dollars in current coin will not." (See note to *Goddard v. O'Brien*, *supra*, in A. Law Register, New Series, Vol. XXI., pp. 640, 641.)

The state of the law upon this subject, under the modification of later decisions both in England and in this country, would seem to be as expressed in *Goddard v. O'Brien* (Queen's Bench Division, *supra*). "The doctrine in *Cumber v. Wane* is no doubt very much qualified by *Sibree v. Tripp*, and I cannot find it better stated than in 1st Smith's Leading Cases [7th ed.] 595." The general doctrine in *Cumber v. Wane*, and the reason of all the exceptions and distinctions which have been engraved on it, may perhaps be summed up as follows—viz.: "That a creditor cannot bind himself by a simple agreement to accept a smaller sum in view of an ascertained debt of larger amount, such an agreement being *nudum pactum*. But if there be any benefit or even any legal possibility of benefit to the creditor thrown in, that additional weight will turn the scale and render the consideration sufficient to support the agreement." (Bull v. Bull, 43 Conn. 455; *Fisher v. May*, 2 Bibb. 449; *Reed v. Bartlett*, 19 Pick. 273; *Union Bank v. Geary*, 5 Peters, 99-114; *La Fage v. McCrea*, 1 Wend. 164; *Boyd v. Hitchcock*, 20 Johns. 76; *Brooks v. White*, 2 Metc. 283; *Jones v. Perkins*, 29 Miss. 139-141; *Hall v. Smith*, 15 Iowa, 584; *Babcock v. Hawkins*, 23 Vt. 561.)

In the case at bar the defendants gave their promissory notes upon time for one half of the debt they owed plaintiff, and also gave plaintiff a chattel mortgage on the stock, fixtures, and other personal property of the defendants under an agreement with plaintiff, to accept the same in full satisfaction and discharge of said indebtedness. Defendants paid the notes as they became due, and plaintiff then discharged the mortgage. Under the cases above cited, and upon principle, this new agreement was supported by a sufficient consideration to make it a valid agreement, and this agreement was by the parties substituted in place of the former. The consideration of the new agreement was that the plaintiff, in place of an open book account for goods sold, got the defendants' promissory notes,

probably negotiable in form, signed by defendants, thus saving the plaintiff perhaps trouble or expense of proving their account, and got security upon all the defendants' personal property for the payment of the sum specified in the notes, where before they had no security.

It was some trouble at least, and perhaps some expense to the defendants to execute and deliver the security, and they deprived themselves of the legal ownership, or of any exemptions or the power of disposing of this property, and gave the plaintiff such ownership as against the defendants, and the claims thereto of defendants' creditors, if there were any.

It seems to me, upon principle and the decisions of this State (save perhaps *Keeler v. Salisbury*, 33 N. Y. 653, and *Platts v. Walrath*, *Lalor's Supp.* 59, which I will notice further on), and of quite all of the other States, the transactions between the plaintiff and the defendants constitute a bar to this action. All that is necessary to produce satisfaction of the former agreement is a sufficient consideration to support the substituted agreement. The doctrine is fully sustained in the opinion of Andrews, J., in *Allison v. Abendroth* (108 N. Y. 470), from which I quote: "But it is held that where there is an independent consideration, or the creditor receives any benefit or is put in a better position, or one from which there may be legal possibility of benefit to which he was not entitled except for the agreement, then the agreement is not *nudum pactum*, and the doctrine of the common law to which we had adverted has no application." Upon this distinction the cases rest which hold that the acceptance by the creditor in discharge of the debt of a different thing from that contracted to be paid, although of much less pecuniary value or amount, is a good satisfaction, as, for example, a negotiable instrument binding the debtor and a third person for a smaller sum. (*Curlewis v. Clark*, 3 Exch. 375.) Following the same principle, it is held that when the debtor enters into a new contract with the creditor to do something which he was not bound to do by the original contract, the new contract is a good accord and satisfaction if so agreed. The case of accepting the sole liability of one of two joint debtors or copartners in satisfaction of the joint or copartnership debt is an illustration. This is held to be a good satisfaction, because the sole liability of one of two debtors "may be more beneficial than the joint liability of both, either in respect of the solvency or of the parties, or the convenience of the remedy." (*Thompson v. Percival*, 5 B. & Adol. 925.) In perfect accord with this principle is the recent case in this Court of *Ludington v. Bell* (77 N. Y. 138), in which it was held that

the acceptance by a creditor of the individual note of one of the members of a copartnership after dissolution for a portion of the copartnership debt was a good consideration for the creditor's agreement to discharge the maker from further liability. (Pardee v. Wood, 8 Hun, 584 ; Douglass v. White, 3 Barb. Chy. 621-624.)

Notwithstanding these later and decisive authorities, the plaintiff contends that the giving of the defendants' notes with the chattel mortgage security and the payment, such consideration was insufficient to support the new or substituted agreement, and cites as authority for such contention the cases of Platts v. Walrath (Lalor's Supp. 59), and Keeler v. Salisbury (33 N. Y. 648).

Platts v. Walrath arose in Justice Court, and the debt in controversy was put forth as a set-off. The remarks of the judge in the former case were quite obiter, for there were various subjects in dispute upon the trial, and from which the justice might have reached the conclusion that he did. The judge in the opinion relied upon says : " Looking at the loose and secondary character of the evidence as stated in the return, it was perhaps a question of fact whether any mortgage at all was given ; or, at least, whether, if given, it was not in terms a mere collateral security for the large note," " even the mortgagee was left to parol proof. Did it refer to and profess to be a security for the note of \$1500, or that sum less the \$50 agreed to be thrown off, etc.?"

There is so much confusion and uncertainty in the case that it was not thought advisable to publish the case in the regular series of reports. The case of Keeler v. Salisbury (*supra*) is not to be regarded as an authority upon the question or as approving the case of Platts v. Walrath (*supra*). In the case of Keeler v. Salisbury, the debtor's wife had joined in the mortgage given by her husband, the debtor, to effect the compromise, thus releasing her inchoate right of dower. The Court held that fact constituted a sufficient consideration to support the new agreement, though the Court in the course of the opinion remarked that it had been held that the debtor's mortgage would not be sufficient, and referring to Platts v. Walrath. But the Court did not otherwise indicate any approval of that case, and there was no occasion to do so, for, as before stated, the Court put its decision upon the fact that the wife had joined in the mortgage.

In view of the peculiar facts in these two cases and the numerous decisions of this and other courts hereinbefore referred to, I do not regard them as authorities against the defendant's con-

tention that the plaintiff's action for the balance of the original debt is barred by reason of the accord and satisfaction, and that the judgment should be reversed, with costs.

All concur.

Judgment reversed.

STILK v. MYRICK.

IN THE COMMON PLEAS, DECEMBER 16, 1809.

[*Reported in 2 Campbell 317.*]

THIS was an action for seaman's wages, on a voyage from London to the Baltic and back.

By the ship's articles, executed before the commencement of the voyage, the plaintiff was to be paid at the rate of £5 a month ; and the principal question in the cause was, whether he was entitled to a higher rate of wages. In the course of the voyage two of the seamen deserted, and the captain, having in vain attempted to supply their places at Cronstadt, there entered into an agreement with the rest of the crew, that they should have the wages of the two who had deserted equally divided among them if he could not procure two other hands at Gottenburgh. This was found impossible, and the ship was worked back to London by the plaintiff and eight more of the original crew, with whom the agreement had been made at Cronstadt.

Garrow for the defendant.

Attorney-General, contra.

LORD ELLENBOROUGH. I think *Harris v. Watson* was rightly decided ; but I doubt whether the ground of public policy, upon which Lord Kenyon is stated to have proceeded, be the true principle on which the decision is to be supported. Here, I say, the agreement is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed. If they had been at liberty to quit the vessel at Cronstadt, the case would have been quite different ; or if the captain had capriciously discharged the two men who were wanting, the others might not have been compelled to take the whole duty upon themselves, and their agreeing to do so might have been a sufficient consideration for

the promise of an advance of wages. But the desertion of a part of the crew is to be considered an emergency of the voyage as much as their death, and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port. Therefore, without looking to the policy of this agreement, I think it is void for want of consideration, and that the plaintiff can only recover at the rate of £5 a month.

Verdict accordingly.

BARTLETT v. WYMAN.

IN THE SUPREME COURT OF NEW YORK, AUGUST, 1817.

[Reported in 14 Johnson 260.]

IN error, on *certiorari*, to the Justice's Court of the city of New York.

This was an action of *assumpsit* for seaman's wages. The defendant in error, who was plaintiff in the Court below, in the month of November, 1813, shipped in the port of New York, on board the letter of marque brig Regent, commanded by the plaintiff in error, who was defendant below, and signed shipping articles in common form, for a voyage from New York to Charleston or Savannah, from thence to France, and back to the United States, at \$17 per month. Three witnesses on the part of the plaintiff below, who were seamen on board of the brig, testified that some time after the brig had been in Savannah, the defendant below came forward to the crew, and observed to them that if they would be faithful to the voyage, he would give them \$30 per month, or the highest wages out of the port, and that this was his own offer, and that there had been no difference or dispute between him and his crew; that several days after the promise to increase their wages some of the people, among whom was the plaintiff below, met the defendant near the gangway, and asked him whether he meant to draw and execute new articles, to which he replied that they must content themselves that he would do what was right. That some time after this the ship's company being ashore, the defendant came to them and observed that he had promised to raise their wages, and the highest wages out of port were beyond all reason; but considering that they were bound at \$17, he thought he would be doing well by them if he increased their wages to

\$30, observing at the same time that he did not know whether his owners would approve it, but if they did not, he would pay it out of his own pocket. The plaintiff's witnesses further testified that about December 22d the defendant below called all hands into the cabin to sign new articles, and observed that he would perform his promise and give them \$30. That the articles were prepared and read to the crew by one Hunter, and were for the continuance of the voyage to France, as in the first articles, and were dated, as was believed, on December 1st, at which time their wages were to commence at \$30. That the new articles were signed by the plaintiff below and all the rest of the crew, but not by the captain, and shortly after the brig dropped down to the light-house to avoid the effect, as the defendant said, of an embargo which he understood was likely to be laid by Congress. On the new articles being produced, there appeared an endorsement upon them, which had been made without the knowledge of the crew, as follows :

“GEORGIA, SAVANNAH.

“The seamen having demanded an increase of wages, and being apprehensive that they might desert if this was not done, these articles were drawn up as a mere matter of form ; it is, however, understood that the articles signed in New York are to bind, and those signed here to be of no avail, December 25th, 1813.

“A. HUNTER,
“Public Notary.”

The plaintiff below proceeded with the brig to France and returned to New York in about six months.

On the part of the defendant it appeared in evidence that the brig was ready for sea about December 25th or 26th, 1813 ; that in the interval between her arrival and the making the promise for the increase of wages, there was a rumor at Savannah that an embargo was about to be laid by Congress, which occasioned a rise in seamen's wages, and many sailors in the port of Savannah left their vessels and went on board of others ; that at this time the crew came after the captain to demand new articles and an increase of wages, saying that they would not go the voyage unless their wages were increased ; that the defendant asked them if they thought it just, but ultimately entered into new articles at an increased rate of wages. The jury found a verdict for the plaintiff below, the defendant in error, for his wages according to the new articles, deducting money advanced, and his proportion of goods embezzled on board of the brig.

The return of the *certiorari* was submitted to the Court without argument.

SPENCER, J., delivered the opinion of the Court. The Court are of the opinion that the judgment of the Court below is erroneous, and that the defendant below was not bound by the new articles entered into at Beaufort for several reasons :

1. As being in contravention of the policy of the act of Congress of July 20th, 1790 (Vol. I. 134). This statute requires, under a penalty, every master of a ship or vessel bound from a port in the United States to any foreign port, before he proceeds on the voyage, to make an agreement in writing or print with every seaman or mariner on board, with the exception of apprentices or servants, declaring the voyage and term of time for which the seaman or mariner shall be shipped. In the present case this was done, and the rate of wages fixed at \$17 per month for the whole voyage. To allow the seamen at an intermediate port to exact higher wages, under the threat of deserting the ship, and to sanction this exaction by holding the contract thus extorted binding on the master of the ship, would be not only against the plain intention of the statute, but would be holding out encouragement to a violation of duty as well as of contract. The statute protects the mariner and guards his rights in all essential points, and to put the master at the mercy of the crew takes away all reciprocity..

2. It is very clear that the owners are not bound by the master's contract, because he had no power to make it. They were already bound by the shipping articles, and the obligation was mutual. He had no authority to give more than the sum for which they had originally stipulated to perform the voyage. If so, then the exaction of higher wages may be considered as an undue advantage taken of the master's situation.

3. The promise to give higher wages is void for the want of consideration. The seamen had no right to abandon the ship at Beaufort, and a promise to pay them an extra price for abstaining from doing an illegal act was a *nudum pactum*.

4. The written agreement at the port of departure is the only legitimate evidence of the contract, and a mariner can recover nothing not specified in the shipping articles where those articles have been entered into. (1 Comyn on Contracts, 369 ; 5 Esp. Rep. 85 ; Peake's Nisi Prius, 72 ; 2 Bos. & Pull. 116.)

5. In the present instance the master never intended to be bound, for he never executed the new agreement.

On these grounds the Court cannot hesitate in saying the judgment below must be reversed.

Judgment reversed.

LATTIMORE v. HARSEN.

IN THE SUPREME COURT OF NEW YORK, AUGUST, 1817.

[*Reported in 14 Johnson 330.*]

THIS was a motion to set aside the report of referees. It appeared from the affidavits which were read that the plaintiffs entered into an agreement under seal dated November 14th, 1815, with Jacob Harsen and the defendant, Cornelius Harsen, by which the former, in consideration of the sum of \$900, agreed to open a cartway in Seventieth Street, in the city of New York, the dimensions and manner of which were stated in the agreement, and bound themselves under the penalty of \$250 to a performance on their part. Some time after the plaintiffs entered upon the performance they became dissatisfied with their agreement, and determined to leave off the work, when the defendant, by parol, released them from their covenant, and promised them that if they would go on and complete the work and find materials he would pay them for their labor by the day. The plaintiffs had received more than the sum stipulated to be paid to them by the original agreement. The action was brought for the work and labor and materials found by the plaintiffs under the subsequent arrangement, and the referees reported the sum of \$400.05 in favor of the plaintiffs.

The case was submitted to the Court without argument.

Per CURIAM. The only question that can arise in the case is whether there was evidence of a contract between the plaintiff and the present defendant to perform the services for which this suit is brought. From the evidence it appears that a written contract had been entered into between the plaintiffs and the defendant, together with his father, Jacob Harsen, for the performance of the same work, and that after some part of it was done the plaintiffs became dissatisfied with their contract, and determined to abandon it. The defendant then agreed if they would go on and complete the work he would pay them by the day for such service and the materials found without reference to the written contract.

This is the allegation on the part of the plaintiffs, and which the evidence will very fairly support. If the contract is made out there can be no reason why it should not be considered binding on the defendant. By the former contract the plaintiffs subjected themselves to a certain penalty for the non-fulfilment, and if they chose to incur this penalty they had a right to do so, and notice of such intention was given to the defend-

ant, upon which he entered into the new arrangement. Here was a sufficient consideration for this promise ; all payments made on the former contract have been allowed, and perfect justice appears to have been done by the referees, and no rules or principles of law have been infringed. The motion to set aside the report, therefore, ought to be denied.

Motion denied.

AYRES v. THE C., R. I. & P. R. CO.

IN THE SUPREME COURT OF IOWA, DECEMBER 6, 1879.

[*Reported in 52 Iowa Reports 478.*]

SOME time in the year 1875 a number of the citizens of Oskaloosa, desirous of securing an extension of the Washington & Sigourney branch of the Chicago, Rock Island & Pacific Railroad from Sigourney to Oskaloosa, agreed to pay to the Chicago, Rock Island & Pacific Railroad Company the sum of \$20,000 when the track of said railroad should be completed from the town of Sigourney into the city of Oskaloosa, provided that if the track should not be completed from the town of Sigourney into the city of Oskaloosa on January 1st, 1876, the parties executing said agreement should be discharged from the obligation to make payment of one half of said sum.

On June 10th, 1875, the Chicago, Rock Island & Pacific Railroad Company entered into a contract with Queally & Bro., for the building of a portion of said road. This contract contains the following provisions : " The work shall be commenced immediately and shall be fully completed in accordance with the terms of this contract, on or before December 1st, 1875, A.D. If the parties of the first part refuse or unreasonably neglect to remedy any imperfections pointed out by the engineer, or in any manner violate the conditions of this contract, so that in the judgment of the engineer there will be just grounds of apprehension that the work will not be completed in the manner and within the time specified, then it will be the duty of the engineer to serve a written notice upon said party, setting forth the grounds for this apprehension, and specifying the manner together with the reasonable time in which the party of the first part may cause such grounds of apprehension to be removed, and if at the expiration of said time said grounds of apprehension be not removed, then full power is hereby vested in said engineer to declare the contract forfeited, and upon such declaration being given in writing to the parties hereto this contract

shall determine immediately, and the party of the second part may forever retain the reserved per centum in consideration of the damages they may have sustained by reason of the forfeiture of the contract, or as an alternative to the declaration of forfeiture the party of the second part shall, on written report to the engineer that apprehensions are entertained that this contract will not be completed in the time and manner herein stipulated, have the right to take such measures as may be deemed by the engineer necessary to insure the completion of the work in the time and manner herein stipulated, and to deduct from the monthly and final estimates of the work done under the contract such sum or sums as may be required to defray the expenses of such measures. Among the measures which, under such circumstances, may be resorted to are the execution by their own agents of such portion of the work as said engineer may select, or the requirement that the parties of the first part shall provide for and employ in the most efficient manner such additional men, carts, teams, etc., as the party of the second part may furnish, in which case said parties of the first part agree to employ said men, carts, teams, etc., in the manner directed by the engineer, who shall have the right to retain from the estimates an amount sufficient to pay said men, carts, teams, etc." Pursuant to this contract Queally & Bro. commenced work in June, 1875. On August 13th, 1875, they executed a power of attorney to C. A. Weed, authorizing him to do all things necessary to the carrying out of the above contract, and placed him in the actual management of the work. On August 26th, 1875, J. J. A. Queally, the senior and active business member of the firm of Queally & Bro., died.

The contract proved not to be a profitable one, and up to the time of the death of the senior member of the firm it had been carried on at a great loss, and a large amount was due to merchants and others for provisions and supplies which had been advanced to laborers, the amount of which was deducted from their pay on the rolls. After the death of J. J. A. Queally, it is claimed by plaintiff that Weed informed Hugh Riddle, the Vice-President and Chief Engineer of the C., R. I. & P. R. Co., of the condition of affairs, and that Riddle, on September 15th, 1875, requested the work to be carried on in the name of Queally & Bro., and agreed to pay whatever debts had been or might be contracted in the prosecution of the work. From July 1st to September 13th, 1875, the plaintiff sold and delivered goods, wares, and merchandise to divers persons in the employ of Queally & Bro., and to the contractors working under Queally & Bro., on account of which the plaintiff claims of the

defendant the sum of \$3000 under the agreement above claimed. The plaintiff also claims to be assignee of various persons who furnished hay, corn, meat, etc., to Queally & Bro., and to the contractors working under Queally & Bro., and their employés. The evidence shows that all the claims of the alleged assignors of plaintiff, with the exception of a very inconsiderable sum, arose prior to September 12th, 1875, and as to this small sum credit was given to the contractors and sub-contractors to whom and on whose orders the sales were made. On account of all the demands the plaintiff claims of the defendant \$15,000. There was a jury trial, resulting in a verdict for plaintiff for \$9797.72. The jury also returned the following special findings:

"Do you find that the defendant made a parol promise to pay the debts of Queally & Bro., and the sub-contractors, that were due to the plaintiff and his assignors in this suit? Answer: Yes.

"When were said promises made—give the months and dates? Answer: On or about September 12th or 13th, 1875.

"To whom were said promises made; give the names of all persons to whom you find the said promises to have been made. Answer: To John F. Lacey, C. A. Weed, and F. J. Queally.

"Do you find that Mr. Riddle about the middle of September, 1878, made a parol promise to Mr. Weed, as the agent of Queally & Bro., to see that the debts of said Queally & Bro. to the plaintiff and his assignors in this suit should be paid? Answer: Yes.

"What was the consideration for such promises? Answer: It was to prevent the stoppage of work on the road, and to enable the railroad company to get its road completed at an early day, and in order that it might draw the money subscribed by the citizens of Oskaloosa."

The defendant's motion for a new trial was overruled, and judgment was rendered for plaintiff. The defendant appeals.

M. E. Cutts for appellant.

John F. Lacey for appellee.

DAY, J. The plaintiff introduced C. A. Weed, general manager for Queally & Bro., who, among other things, testified as follows: "I went to Chicago three times after the death of J. J. A. Queally, to confer with Mr. Riddle about the business, and I had a conference with him at Oskaloosa in regard to the financial matters of the work. The first interview was about September 15th, 1875, after the death of Mr. Queally, when I went to Chicago at the request of Mr. Riddle, with the pay-rolls from the beginning of the work to September 1st, and other papers and figures relating thereto, which he examined.

I told him that Queally & Bro. were losing money, and that it would be impossible for them to complete the work at the contract price, and unless they received aid in some way from the company they would have to throw up the work. He said that at that time he could not advance the price, nor would he allow Queally & Bro. to throw up the work; that he wanted the work to proceed to completion under the name of Queally & Bro., and for me to remain as manager of the work, and at its completion, if he saw the work had been handled economically, that then he would advance money sufficient to pay the actual expense of the work. He also said that as Queally & Bro. had proven themselves unable to carry on the work financially, and it would be necessary for the company to advance money to pay for the labor, supplies, etc., that he would send a man to Oskaloosa to handle the money advanced by the company, taking my receipt for the money paid out as agent of Queally & Bro., that man to also vouch for all bills of merchants of whom we were getting supplies, so that they would feel safe and continue to give credit to Queally & Bro.; it was at my own request that this man was sent for the above purpose, as the merchants, mechanics, and others whom we had dealt with at Oskaloosa for necessary supplies had after the death of Mr. Queally found that Queally & Bro. were unable to pay their bills, and would, therefore, give them no more credit, without which the work would have to stop, all of which I told Mr. Riddle, and that in order to carry on the work under the name of Queally & Bro. it would be necessary for him to send a man to Oskaloosa who should have power to approve all debts contracted for the necessary expenses of carrying on the work. F. J. Queally was present with me at this interview, from whom Mr. Riddle required a power of attorney empowering me to do the business of Queally & Bro. on the contract between them and the railroad company, said power of attorney to be signed by F. J. Queally as surviving partner of Queally & Bro., which power of attorney was made out, at the direction of Mr. Riddle, by some one in his employ. At this time there was quite a large amount due to merchants and others at Oskaloosa for provisions and supplies which had been advanced to laborers and was deducted from their pay on the rolls, which Mr. Riddle said, if after a thorough examination of the books and rolls of Queally & Bro. they were found to be honest and legitimate, would be paid, but until the books and accounts of Queally & Bro. had been looked over by a man whom he would send, he could do nothing about it. He told me to tell the people of Oskaloosa whom we had dealings with he would see that all bills contracted for by

Queally & Bro., for supplies necessary for carrying on the work, would be paid."

Respecting this same interview at Chicago F. J. Queally testified as follows: "About September 10th, 1875, I met Mr. Riddle for the first time. I then told him the contract was a losing business at the price he was then paying per yard, and wanted him to take the contract off of our hands or raise the prices. He then said that we should go on with the contract at the present price, and under the same name, Queally & Bro., and any deficiency in the monthly estimate of the work and the actual contracts made by us in carrying on said work would be paid by the Chicago, Rock Island & Pacific Railroad Company, the defendant. He reserved the right to place a man, his own man, in charge of the money, to see that said money was used in the right channel in paying for said work and contracts made by us in carrying on the work. . . . The consideration for this agreement of Mr. Riddle was that he did not want to go to the trouble of reletting the contract to another party and having the work stop. Mr. Riddle put a man in charge of the work and to pay out the money."

The witness Weed testified to another interview with Mr. Riddle in Chicago in November, as follows: "At another time John F. Lacey and myself went from Oskaloosa to Chicago at the request of Mr. Riddle; Mr. Lacey went as attorney for the creditors of Queally & Bro. The interview between Mr. Lacey and Riddle was in my hearing, and in which I took part. At that time Mr. Riddle told Mr. Lacey and myself that all of Queally & Bro.'s indebtedness for supplies advanced to men, as well as board which was charged to men, and which had been stopped from their wages and appeared on the rolls under the head of stoppages, should be paid. He said at that time that he would furnish money to pay off the rolls in full, and all other necessary expenses incurred in building the road, and that no one who advanced anything in the way of necessary supplies should lose anything for so doing; that all money so advanced he would charge to Queally & Bro., and hold it as a claim against them till final settlement. He said he would pay all stoppages on the rolls that had been taken out of the men's wages. He told me to inform the merchants and others at Oskaloosa that they would not lose anything on any necessary provisions or other supplies advanced to Queally & Bro."

Respecting this interview John F. Lacey testified as follows: "Mr. Riddle and I looked over the rolls to see whether the stoppages would cover the amount of claims I represented. During the conversation Mr. Riddle said, Weed being present,

that he was willing to pay whatever the road cost, and whatever went into the road he was willing to pay. He told me he had some securities, some shovels and so on, and he did not know what he would get out of them ; that there was some contest about them, but that he would pay all these claims that were just, and that went to the men, or that went into the road. When we came back from dinner he claimed that he had found a discrepancy in Ferguson's rolls. He wanted to know why he, Ferguson, had so many men in the last days of September, and on the next day twenty-five or thirty more men. He was mad and spoke rather emphatically. Weed said he could not explain it, but finally explained that perhaps these were a lot of men that had come down from Montezuma, but did not explain it for some time. Mr. Riddle then said that, having made this discovery, he would have to suspend his action. He said previously he would pay at once, but he said afterward he would pay it if there was no fraud in the matter, but he would have to investigate it. He was angry, and Weed's explanation was not prompt enough. The interview ended pretty soon, and he told me he would write me. He made no further promise. Mr. Riddle made the promise to me. He said to Mr. Weed : ' I always told you I would not release you from your contract, and shall charge this up to Queally & Bro.' Mr. Riddle said he would charge all these amounts up to Queally & Bro. under their contract."

The witness Weed testified to another interview between himself and Mr. Riddle, as follows : " At the interview between him and myself in Oskaloosa I spoke to him about the indebtedness of Queally & Bro. for supplies furnished for the work, told him the creditors were very anxious about their pay, and he said he was not ready to make any definite answer." The above contains substantially all that was said by Riddle respecting the payment of these claims as shown by the testimony introduced on behalf of the plaintiff. At the time this testimony was offered the defendant objected to all of it which tended to prove an agreement to pay the debts of Queally & Bro., because it is not competent to prove a parol promise by defendant to pay the debts of another. The objection was overruled, and the defendant excepted. The Court, among others, gave the jury the following instructions :

" 5. If you find from the evidence that the firm of Queally & Bro. had the contract for grading the defendant's road from the Keokuk County line to the city of Oskaloosa, and that at the time J. J. A. Queally, of said firm, deceased, the firm was insolvent and incapable of going on with the work under the con-

tract, and thereupon the surviving partner, F. J. Queally, had an interview with Hugh Riddle, in which he informed said Riddle of the insolvent condition of the firm and its inability to continue the work further or to pay its outstanding debts contracted for necessary supplies and material furnished in the construction of the road ; that thereupon Riddle orally promised to pay such outstanding debts, and directed Queally or his agent, C. A. Weed, to inform the parties holding such claims that they would be paid, as well as all other necessary supplies and material thereafter furnished in the construction of the road ; that such parties were informed of such promise in accordance with the direction of said Riddle ; that the railroad company thereafter sent its agent to Oskaloosa to take charge of the pay-rolls and to pay off the workmen and others furnishing supplies for the road, with money furnished him by the company for that purpose ; and you further believe from the evidence that the object of said Riddle in making such promise was to prevent the work on the road from being suspended, and to enable the railroad company to have its road completed without delay ; that such promise did have such effect ; then the defendant is liable upon such promise, although not in writing, provided it is sufficiently shown that said Riddle was the general agent of the company and authorized to make contracts of such character.

" 12. If you find from the evidence that the defendant made a parol promise to Queally & Bro., or to the surviving partner of said firm, to see paid the debts of said Queally & Bro. that had accrued and been incurred in the prosecution of the work on the railroad of defendant, under the original written contract executed by said Queally & Bro., to perform said work, and further find that the only consideration for such parol promise was the doing and agreement to do by said F. J. Queally as such surviving partner only such acts as he was in any event under legal obligation to do, and that thereby the defendant acquired and derived no new or additional benefit, right or advantage that it did not before fully have and possess, then such parol promise, not being in writing, is void ; and this is so, even though defendant made said parol promise for the purpose of inducing said F. J. Queally to continue said work to its completion under said written contract." This last instruction was given at the request of the defendant.

The case has been presented by counsel in two aspects. First. Is there any consideration for the parol promise of the defendant to pay the debts incurred by Queally & Bro. in the prosecution of the work ? Second. Is the parol promise of the

defendant to pay the debts of Queally & Bro. void under the statute of frauds?

A consideration consists of some benefit or advantage accruing to the promisor, or of some loss or disadvantage incurred by the promisee. The jury in this case found specially that the consideration for the defendant's promise "was to prevent the stoppage of work on the road, and to enable the railroad company to get its road completed at an early day, and in order that it might draw the money subscribed by the citizens of Oskaloosa."

I. Does this finding of the jury show a consideration sufficient to support the defendant's promise? The jury have found that the consideration consisted in an advantage accruing to the promisor—to wit, that the work should not be stopped, but that it should be completed at an early day so that defendant might draw the money subscribed by the citizens of Oskaloosa. But the defendant, under its original contract, had the right to insist upon all these things. The amount subscribed by the citizens of Oskaloosa was all payable if the track should be completed into the city of Oskaloosa on January 1st, 1876. Queally & Bro., under their contract, were bound to complete the work by December 1st, 1875. They were under obligation to perform their contract. They had no right to quit work and abandon their contract. If they performed their contract as they agreed, the amount subscribed by the citizens of Oskaloosa would be secured. The consideration, as found by the jury, secured to the defendant no advantage not before possessed. The case of *Reynolds v. Nugent*, 25 Ind. 328, is, in principle, the same as the one at bar. Nugent signed a written contract by which he agreed to enter the military service of the United States to the credit of Tobin township, in consideration of the payment of a bounty of \$100. Reynolds, the agent of the township, accompanied Nugent to the mustering office to procure his muster in, and to pay him the bounty promised. While there Nugent was offered by others a bounty of \$350, and refused to perform his contract unless the township would pay him that amount; and Reynolds, thereupon, to induce Nugent to perform his contract, promised that he would be responsible that Nugent should receive that amount from Tobin township. The Court say: "It is urged on behalf of the appellant that the promise of Reynolds to pay \$350 was void for want of consideration. This position, in our judgment, is correct. The contract was already complete and perfect. Nugent had, as he states, agreed to enter the military service of the United States and have the credit given to Tobin township upon the promise that he should be

paid the sum of \$100. That promise was binding upon both parties. The one promise was a sufficient consideration for the other. He now claims that the appellant, to induce him to fulfil his legal obligation, promised to pay him an additional sum. There were no new duties assumed by Nugent, but he claims that in consequence of the promise by the appellant he went forward and performed the contract he was already under legal obligation to comply with. If the appellant made the promise, it was without any adequate consideration, and cannot be enforced in law. (1 Parsons on Contracts, 5th ed., 437.) That a promise to do what a person is bound to do by law is not a good consideration for another undertaking, and that a person is not bound to fulfil his promise to pay another for doing what he is bound by law to do, is well settled." In *Parmelee v. Thompson*, 45 N. Y. 58, the Court say: "If the only consideration for the promise of the creditor is the performance by the debtor, or a promise to perform, some act which he is legally bound to perform, the promise is without consideration." See, to the same effect, *Pulman v. Pulman*, 4 Ind. 612; *Crowhurst v. Tannack*, 16 Eng. L. and Eq. 499; *Gibson v. Renne*, 19 Wend. 389; *Miller v. Holbrook*, 1 Wend. 318; *Stilk v. Myrick*, 2 Camp. 317.

In *Ferterman v. Parker*, 10 Ind. 474, the plaintiff contracted to put in operation a saw-mill for the defendant for \$100, part of which was paid at the time. The plaintiff afterward refused to go on with the work, because the price was too low, and defendant then sent plaintiff word to do the work and he would pay what was right. The plaintiff did the work and sued for his compensation. The Court say: "On the part of the plaintiff it is insisted that, although the first contract was not rescinded, yet the parties were at liberty to vary it. There is no doubt of this proposition; but it will be recollected that the variation of a contract is as much a matter of contract as the original agreement, it equally requires the concurrence of intention in the parties, it cannot be varied at the mere will and pleasure of either. But in what was the contract varied; not in the work to be done, that was not altered in the slightest manner; the plaintiff came under no new obligation, he was to do the same work he had previously bound himself to do. It was varied, says the plaintiff, in this, that the defendant promised to give an additional \$50 if he would build the mill. Let it be admitted that the defendant, under the circumstances, had, in so many words, promised the plaintiff that he would give him \$50 more, or \$150 for building the mill, would that have been in law a valid promise? I concur in the opinion that

it would not. A consideration is an essential ingredient to the legal existence of every simple contract. This consideration consists, as defined by Mr. Smith, in his Treatise on Contracts, p. 87, to be 'any benefit to the person making the promise, or any loss, trouble, or inconvenience to, or charge upon, the person to whom it is made.' The case states that the \$100 originally promised had been paid by the defendant, and the controversy is for the \$50 under the alleged promise. What loss, trouble, or inconvenience, or charge resulted to the plaintiff by his executing the work? He was bound to build the mill by his original contract, and he was to do and did nothing more. What benefit was to result to the defendant by the promise to pay the additional \$50? None whatever. He was to receive from the plaintiff precisely the same quantum of work without it as with it. The promise, therefore, if made, was purely a *nudum pactum*, not binding in law, however it may be so in honor and conscience." See also Proctor v. Kent, 12 B. Mon. 252; Overden v. Wiley, 30 Ala. 709; Jones v. Miller, 12 Mo. 408; Laidlow v. Hatch, 75 Ills. 11; Owen v. Stevens, 78 Ills. 462.

It is fully apparent from these authorities that no consideration of advantage to the defendant existed in this case, and that the consideration upon which the jury based the defendant's promise will not support that promise.

II. We have seen that the consideration which the jury found existed will not support the defendant's promise. If we look for a consideration growing out of any loss or disadvantage incurred by Queally & Bro., we will find it equally wanting. The evidence does not show any express agreement of Queally & Bro., or of the surviving member of the firm, to do anything. The most that can be inferred from the evidence is that the surviving member of the firm impliedly agreed to go on with the work, and perform it in the manner and under the terms provided in the original agreement. In assuming to do this he undertook no more than he was under obligation to perform before.

III. We are equally unable to find any consideration for the promise growing out of any prejudice or disadvantage to the creditors of Queally & Bro., the plaintiff in this suit and his assignors. Nearly all of their claims arose before the defendant's promise was made. As to that portion of these demands there can be no pretense that they changed their situation or sustained any prejudice because of defendant's promise. As to the very inconsiderable portion of the claims which arose after defendant's promise, it does not appear that credit was extended in any manner different from what it was given before. In

fact, in almost every instance it appears that credit was given solely to the person to whom, or on whose order, the sale was made. It follows from what has been said that the Court erred in giving the fifth instruction, that the general verdict for plaintiff is in conflict with the twelfth instruction given, and that the consideration on which the jury found the defendant's promise was made does not support the promise.

The foregoing considerations are decisive of the case. It is unnecessary to consider the second question so ably discussed by counsel—namely, is the promise of the defendant, though resting upon sufficient consideration, void under the Statute of Frauds, because not in writing? The judgment of the Court below is reversed.

EMILY R. ROLLINS v. ALEXANDER MARSH.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY 12, 1880.

[*Reported in 128 Massachusetts Reports 116.*]

CONTRACT in two counts. The first count was on an account annexed for board, lodging, and care furnished Lucy A. Rollins, an insane person, of whom the defendant was guardian. The second count was on a written contract, by the terms of which the plaintiff was to furnish Rollins with board, lodging, and care during her natural life, in consideration of the use of certain real estate and personal property belonging to Rollins. The writ, dated November 23d, 1877, was against the defendant, "as he was the guardian of Lucy A. Rollins."

Trial in the Superior Court, before Dewey, J., who allowed a bill of exceptions in substance as follows:

The defendant was appointed guardian of Lucy A. Rollins, an insane person, in March, 1874. The defendant, on March 20th, 1874, made with the plaintiff the written contract declared on; and the plaintiff then entered into possession of the real and personal estate therein named, and continued in possession thereof until April 1st, 1877. The plaintiff assumed the care and support of Rollins on March 20th, 1874, under the contract, and continued such care and support until December 11th, 1876, when Rollins, with the consent of the plaintiff, left for a visit to her daughter, and died while thus absent, on October 27th, 1877. The plaintiff contended that, a few weeks

after March 20th, 1874, she found the support and care of Rollins more onerous and expensive than she had anticipated, and more than it had previously been ; that she requested the defendant to remove her, and declined to continue her future care unless the defendant would make a further compensation therefor ; and that the defendant thereupon agreed to make her such further compensation as should be right. The making of any such contract was denied by the defendant.

The defendant contended that the plaintiff could not maintain an action in its present form against him for the care and support of his ward ; that if any contract was made by him as guardian, this action could not be maintained ; that the remedy was either by an action against the ward or her administrator, or on the bond given by the defendant as guardian ; and that there was no consideration for a new agreement while the written one was in force, for the care and support of the ward during her life.

The jury returned a verdict for the plaintiff ; and the judge reported the case for the determination of this Court. If the action could be maintained, judgment was to be entered on the verdict ; otherwise, the verdict was to be set aside.

W. A. Gile for the defendant.

B. W. Potter for the plaintiff.

SOULE, J. Guardians of minors, spendthrifts, or insane persons do not become owners of the property which is placed under their charge. The title thereto remains in the wards. The guardians have only a naked power, not coupled with an interest. The debts of the ward remain his debts, and can be recovered by suit against him, not by suit against the guardian. *Brown v. Chase*, 4 Mass. 436 ; *Simmons v. Almy*, 100 Mass. 239. Such suit may be defended by the guardian in behalf of the ward. The guardian cannot bind the person or estate of his ward by contract made by himself. Such contract binds him personally, and recovery for breach of it must be had in an action against him. *Hicks v. Chapman*, 10 Allen, 463 ; *Bicknell v. Bicknell*, 111 Mass. 265 ; *Wallis v. Bardwell*, 126 Mass. 366. He cannot escape liability on such contracts by reciting that he makes them in his official capacity ; and it is immaterial, in a suit brought against him thereon, whether he is described by his official title or not. The judgment in either case must be against him personally, and the description has no legal effect. It may be disregarded as surplusage. It is immaterial, therefore, that the cause of action is described in one count as a contract made by the defendant, and in another as a contract made by the defendant in his official capacity. The

legal liability being the same in whichever form the contract is made, there is no inconsistency in the counts.

Accordingly, in *Thacher v. Dinsmore*, 5 Mass. 299, the action was brought on two promissory notes, by which the defendant "as guardian to A. L., an insane person," promised to pay the plaintiffs or order one sum on a day certain and another on demand. There were two additional counts on the same notes, in which the promises were alleged to have been made by the defendant without adding his capacity of guardian, and a verdict having been found for the plaintiffs on the general issue pleaded, judgment was rendered upon it. Parsons, C.J., in giving the opinion of the Court, said: "If an action is maintainable against any person, it must be the defendant; for the guardian of an insane person cannot make his ward liable to an action as on his own contract, by any promise which the guardian can make. Neither can the defendant be sued in his capacity of guardian, so as to make the estate of his ward liable to be taken in execution; for the judgment is not against the goods and estate of the ward in his hands, but against himself. A creditor may sue the insane person, who shall be defended by his guardian, and in that case, judgment being against the insane person, it may be satisfied by his property. The defendant's description of himself in the notes as guardian cannot vary the form of action; but it is for his own benefit, that, on payment of the notes, he may not be precluded from charging the moneys paid to the account of his ward." See also *Forsster v. Fuller*, 6 Mass. 58; *Sumner v. Williams*, 8 Mass. 162; *Fiske v. Eldridge*, 12 Gray, 474.

The writ against the defendant in the case at bar orders the sheriff to attach the goods and estate of "Alexander Marsh, as he was the guardian of Lucy A. Rollins," and to summon "the defendant" to appear, etc. This is a writ against the defendant personally, and is the sufficient foundation for a judgment against him. As has already been seen, a suit on a demand against a ward must be brought against the ward, not against the guardian, and the form of writ used when a suit is brought against an administrator on a contract made by his intestate is not appropriate. In such case, the order in the writ is to attach the goods and estate which were of the intestate, in the hands of the administrator. Such form is necessary there, because a judgment when obtained is to be paid out of the estate of the intestate, the title to which is in the administrator, not out of the administrator's own estate, and the writ must indicate whose estate is to be attached, if any. This form is not necessary in the case of a ward, because the title to the estate re-

mains in him, and does not pass to his guardian. The words "as he was the guardian," etc., have no legal effect in the writ, and may be disregarded as surplusage.

The original contract made by the defendant for the support of his ward was his own contract, and the subsequent arrangement made for further compensation to the plaintiff was his own contract, on which he alone, if any one, was liable to the plaintiff. This clearly follows from the doctrine of the cases above cited. The defendant contends that this subsequent arrangement did not impose any liability on him, because it was without consideration. The parties had made a contract in writing with which the plaintiff had become dissatisfied, and which she had informed the defendant that she should not fulfil unless the terms were modified. If she had abandoned her contract, he might have made a new arrangement with some one else for the support of his ward, and enforced whatever remedy he had for the breach against the plaintiff. Instead of this, he made a new contract with her, which operated as a rescission of the original agreement. Meanwhile the plaintiff had continued in the performance of her original agreement, which was recognized by both parties as subsisting and binding, till it was rescinded by the making of the new one. The release of one from the stipulations of the original agreement is the consideration for the release of the other; and the mutual releases are the consideration for the new contract, and are sufficient to give it full legal effect. *Cutter v. Cochrane*, 116 Mass. 408. The action can be maintained, and, according to the terms of the report, there must be judgment on the verdict.

PETER J. VANDERBILT, APPELLANT, *v.* JOHN
SCHREYER, IMPLEADED, ETC., RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, MARCH 6, 1883.

[*Reported in 91 New York Reports 392.*]

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made June 1st, 1880, which reversed a judgment in favor of plaintiff, entered upon a decision of the Court on trial at a Special Term and dismissed the complaint. (Reported below, 21 Hun, 537.)

The nature of the action and the material facts are stated in the opinion.

T. M. Tyng for appellant.

John L. Lindsay for respondent.

RUGER, C.J. This was an action to foreclose a mortgage for \$5000 given September 5th, 1873, by one James Dunseith and wife to John Schreyer, and by him assigned to the plaintiff on May 5th, 1874.

Schreyer was made a party defendant, and it was sought to charge him with the payment of any deficiency that might arise upon a sale of the mortgaged premises, upon the ground that he had guaranteed the payment of the mortgage debt.

Schreyer answered, and after admitting the assignment and the guaranty of payment alleged by way of defence, that on February 2d, 1874, the plaintiff entered into a contract with George Gebhard and Matthew L. Ritchie for the erection by him of certain buildings for them upon certain lots in the city of New York, for which he was to receive \$8175, to be paid as follows: "When the said houses are topped out, a payment of \$5000 by assignment of a bond and mortgage held by John Schreyer on the property of Anna Maria Schreyer, No. 350 West Forty-second Street, New York City," and the balance, amounting to \$3175, when the houses should be fully completed. Vanderbilt commenced performance of his contract and continued until he became entitled to the assignment of the \$5000 mortgage. Schreyer thereupon offered to assign it to the plaintiff, but the latter refused to accept an assignment unless Schreyer would also guarantee payment. The defendant refused to do this, and Vanderbilt then suspended work upon the buildings for about two months. The defendant then under protest, and believing, as he alleges, that he was acting under compulsion, executed the assignment with the guaranty in question. The plaintiff then completed his contract and received the balance of the consideration. The answer further states "that it was neither under said contract or otherwise made a condition of the plaintiff's accepting the assignment of said mortgage that this defendant or any other person should guarantee the payment thereof," and further "that no consideration ever passed to him or his principals for such guaranty, and the same was and is null and void."

Upon the trial of the action at Special Term the plaintiff produced and proved the mortgage in question, and also an assignment from defendant to plaintiff in the usual form, but containing the following clause: "And I hereby guarantee the payment of said bond and mortgage for \$5000 and interest from May 5th, 1874, by due foreclosure and sale." The assignment and guaranty were sealed and executed in the presence of a

subscribing witness. The plaintiff thereupon rested, and the defendant offered to prove in substance the facts alleged in his answer, which offer was objected to and excluded upon the ground that such answer did not set up facts constituting a defence. The defendant excepted to such ruling. The Court thereupon held that said guaranty was absolute, and ordered judgment against Schreyer for the deficiency which had previously been ascertained by a sale of the premises. An appeal was taken to the General Term, which reversed the judgment and directed a dismissal of the complaint upon the ground that Schreyer was improperly made a defendant, because the guaranty in question was in effect a guaranty of collection only, and that no right of action arose thereon until after the amount of the deficiency had been ascertained by a judicial sale of the mortgaged premises.

We differ in our conclusion from that reached by both of the courts below.

A more serious question, however, arises under the exception taken to the rulings of the Special Term excluding the evidence offered by the defendant to prove the facts stated in his answer, showing that the guaranty was without consideration.¹

In considering this question the allegations in the answer must be assumed to be true, and that the defendant would have proved them if he had not been precluded by the rulings of the Court from doing so. The answer, while perhaps inartificially drawn, certainly alleged all of the facts necessary to show that neither Gebhardt and Ritchie, nor the plaintiff, had received any consideration for the guaranty in question. This he should have been allowed to prove. The production of the assignment in evidence, purporting to be executed "for value received," and being under seal was *prima facie* evidence only of a valuable consideration. It was not conclusive and could be disproved if it was in the defendant's power to do so. (3 R. S. [6th ed.] 672, § 124; *Bookstaver v. Jayne*, 60 N. Y. 146; *Anthony v. Harrison*, 14 Hun, 198; affirmed in this Court, 74 N. Y. 613.)

The incorporation of this guaranty into the assignment for which there was a consideration does not affect the question. It was not essential to the assignment, and was, so far as its legal effect was concerned, a separate instrument, and must be supported upon a sufficient consideration or treated as *nudum pactum*.

It is quite clear that the plaintiff had no right to demand this guaranty by the terms of his original contract with Gebhardt and Ritchie. That was satisfied by a mere naked transfer of his interest in the mortgage.

¹ Only so much of the opinion is given as relates to this question.—ED.

It was held in *Van Eps v. Schenectady* (12 Johns. 436) that an agreement to execute a deed of lands was satisfied by the execution of a deed, without warranty or covenants. So it has been held that a party has no right to impose any conditions to the performance of a contract, except those contained in the contract itself. (*Brown's Water Furnace Co. v. French*, 34 How. Pr. 94.) It being clear that Vanderbilt had no legal right to require, as a condition to the fulfilment of his contract, the performance of an act not required by the contract, it is difficult to see what benefit he has bestowed or what inconvenience he has suffered in return for the undertaking assumed by the defendant. He promises to do only that which he was before legally bound to perform. Even though it lay in his power to refuse to perform his contract, he could do this only upon paying the other party the damages occasioned by his non-performance, and that in contemplation of law would be equivalent to performance. He had no legal or moral right to refuse to perform the obligation of the contract into which he had upon a good consideration voluntarily entered.

There is no evidence in support of a claim that this guaranty was given as a compromise of any dispute arising with reference to the obligations of the plaintiff under his contract with Gebhardt and Ritchie. The case is not, therefore, brought within the cases in which a promise has been upheld on the theory that it was made in settlement of a controversy over disputed claims. The authorities seem quite uniformly to show the inadequacy of the consideration alleged for the guaranty in question. In *Geer v. Archer* (2 Barb. 420), the defendant visited the plaintiff to pay her an instalment upon a mortgage given by him a few weeks before on a purchase of land. She complained that she had not received the fair value of her land upon such purchase. The defendant offered to give her his note for \$200 to satisfy her complaints. She replied that she would be satisfied with that, whereupon the note in question was given. It was held that this note was void for want of consideration. So where land was sold and described in the deed as containing a certain quantity, and a deficiency was afterward discovered, it was held that there was no obligation on the grantor to compensate the grantee for such deficiency, and a promise to pay the same was without consideration. (*Smith v. Ware*, 13 Johns. 257; *Ehle v. Judson*, 24 Wend. 97.)

Pollock states the rule as follows: That "neither the promise to do a thing, nor the actual doing of it, will be a good consideration if it is a thing which the party is bound to do by the general law, or by a subsisting contract with the other party."

(Pollock on Principles of Contracts, 161; Crosby *v.* Wood, 6 N. Y. 369; Deacon *v.* Gridley, 15 C. B. 295.) "Nor is the performance of that which the party was under a previous valid, legal obligation to do a sufficient consideration for a new contract." (2 Parsons on Contracts, 437.) When certain sailors had signed articles to complete a voyage, but at an intermediate port refused to go on, and the captain thereupon promised to pay them increased wages, it was held that the promise was without consideration. (Bartlett *v.* Wyman, 14 Johns. 260.) A firm having a contract to build a railroad found the contract unprofitable, whereupon the railroad company promised if they would go on and complete the contract they would repay to the contractors all of the obligations which they had or would incur in consequence of their completion of the work. Held no consideration. (Ayres *v.* The C., R. I. & P. R. Co., 52 Iowa, 478.)

When a mortgagor, as a condition to the payment of his mortgage, exacted from the mortgagee an obligation that he would procure the cancellation of a certain outstanding bond executed by the mortgagor, or pay him the sum of \$100, said bond being given to indemnify against some apparent incumbrance, it was held, that it not being shown that there was any incumbrance existing against the land, the obligation was without consideration. (Conover *v.* Stillwell, 34 N. J. L. 54.) When the plaintiff agreed to enter the military service of the United States to the credit of the town of Tobin for \$100, and on arriving at the place of enlistment, being offered an advanced price by others, refused to perform unless they would pay him \$250 additional, held that an obligation to pay him the additional amount was void for want of consideration. (Reynolds *v.* Nugent, 25 Ind. 328.) A sailor signed articles for a voyage to Melbourne and home at £3 per month; several of the crew deserted at Melbourne. The captain, to induce plaintiff to remain, signed fresh articles for six pounds per month. Held no consideration for the promise. (Harris *v.* Carter, 3 Ellis & Blackburn, 559; to same effect *Stilk v. Myrick*, 2 Camp. 317.) When defendants gave plaintiff's notes to provide funds to take up obligation, which plaintiff had previously contracted to pay, held no consideration. (Mallalieu *v.* Hodgson, 16 Ad. & El. [N. S.] 689.) A promise to pay an attorney additional compensation to attend as a witness, after he has been duly subpoenaed, is without consideration. The attorney did nothing except what he was legally bound to do. (Smithett *v.* Blythe, 1 Barn. & Ad. 514.)

It would doubtless be competent for parties to cancel an existing contract and make a new one to complete the same work

at a different rate of compensation, but it seems that it would be essential to its validity that there should be a valid cancellation of the original contract. Such was the case of *Lattimore v. Harsen* (14 Johns. 330).

It necessarily follows from these authorities that the plaintiff had no right to impose, as a condition to the performance of his contract, that the payment of said mortgage should be guaranteed. Although the defendant was not a party to the original contract, and the consideration and contract between him, Gebhardt and Ritchie does not appear, yet we must assume that he acted at the request of Gebhardt and Ritchie and was required only by such contract to execute such an assignment as Gebhardt and Ritchie had contracted to give. The answer at all events sets up that he received no consideration from any one for the guaranty sued upon.

The answer also alleges that the sole consideration received for this guaranty was the performance by the plaintiff of his contract with Gebhardt and Ritchie.

We think this answer sets forth a defence to the action, and inasmuch as the defendant has been erroneously deprived of the opportunity of proving it, if in his power to do so, that a new trial should be ordered.

The judgment, therefore, of the General Term dismissing the complaint should be reversed, and its order reversing the judgment ordered against the defendant at Circuit affirmed, and a new trial ordered, with costs to abide the event.

All concur, except ANDREWS and DANFORTH, JJ., not voting.
Judgment accordingly.

ALVAN ROGERS AND OTHERS v. ROGERS & BROTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS,
JUNE 20, 1885.

[*Reported in 139 Massachusetts Reports 440.*]

CONTRACT for the breach of an agreement to sell goods. Trial in the Superior Court, without a jury, before Gardner, J., who reported the case for the determination of this Court, in substance as follows :

The plaintiffs introduced evidence tending to show that, on or about July 8th, 1879, the defendant, a manufacturing corporation located in Connecticut, by its agent, C. A. Hamilton, orally agreed to sell and deliver to the plaintiffs in Boston, from time to time, as ordered by them, such silver-plated ware—

namely, spoons and forks—as they might need in their business, and order during the season—that is, between July and January 1st, 1880—at stipulated discounts from certain list prices, and that the goods were to be paid for at the end of each month; that, pursuant to this contract, and on the day of its date and at different times previously to October 14th, 1879, the plaintiffs ordered goods amounting in the aggregate to several thousand dollars, a part of which were delivered and paid for according to the contract; that, on said October 14th, the defendant utterly repudiated its contract, and refused to fill any of the unfilled orders, or to receive and fill any future orders, except upon the express promise on the part of the plaintiffs to pay for the goods at a less rate of discount than that stipulated in the contract, the effect of which was to advance the price of said goods about $8\frac{1}{4}$ per cent on the agreed price; that the plaintiffs, after several days' delay, and not being able to buy the goods elsewhere on so favorable terms, or at any price, agreed to buy them of the defendant during the remainder of the season upon the new terms demanded by the defendant.

All the evidence relating to the repudiation and refusal of the defendant, and of the subsequent agreement of the parties, is contained in the following correspondence:

On October 14th, 1879, the defendant wrote to the plaintiffs as follows: "My attention has just been called to the fact that, in remitting for bills for the months of July and August, you have deducted 50 per cent in place of 40, and then taken in addition all extra discounts allowable for quantity and cash settlements. I do not know upon what authority or why you did this. I cannot think that any one can have offered you such terms. The difference amounts to about 20 per cent. and, of course, it is absurd to presume that we can stand any such deduction from our bills; perhaps it was done inadvertently. I write now that there may be no misapprehension in the future. We cannot allow the change of discount from 40 per cent, as we invariably invoice, and expect the figures we give, less, if you please, the extra discounts for rebates and cash." And, on October 20th, as follows: "We wrote you under date of October 14th, in regard to prices and terms of settlement, to which we have no response. We are awaiting your reply before shipping goods ordered, as we must know that you accept our terms as therein stated, else we must decline to fill your orders."

On October 22d the plaintiffs sent the following telegram to the defendant: "Terms accepted for the present. Ship everything next express." And on October 24th the following: "We telegraphed acceptance terms. Are goods coming?"

On October 24th the defendant wrote to the plaintiffs as follows: "We are in receipt of your telegram accepting our terms, and shall be able to ship some goods to you to-morrow. The telegram we have reference to is yours of to-day. We have not previously received one."

On October 25th the plaintiffs wrote to the defendant as follows: "Enclosed settlement is in accordance with written agreement with Mr. C. A. Hamilton, and cannot be affected by our telegram, which you should have received. It reads, 'October 22d, terms accepted for the present. Ship everything next express.' We were obliged to consent to this to get our goods sold by us. We trust, however, you will waive your repudiation of contract with us when we come to a better understanding after a personal interview."

On October 27th the defendant replied by letter as follows: "We are in receipt of your favor of the 25th, in which you refer to a 'written agreement with C. A. Hamilton' justifying the terms of settlement you claim on goods sent you during the months of July, August, and September. We know nothing of any agreement whatever, and whatever it may be, in so far as it differs from my offer of October 14th, you must consider it as cancelled or 'repudiated' on all goods invoiced by us since October 14th. It is only by the recognition of the terms therein proposed that you can expect us to fill your orders now in hand or that you may send us in the future."

Under the agreement disclosed in the correspondence, the plaintiffs, from time to time during the remainder of the season, ordered goods of the defendant, and they were shipped and paid for according to the agreement contained in the defendant's letter of October 14th, and the plaintiffs' telegram of October 24th. It was also admitted that the orders unfilled on October 14th were subsequently filled and paid for at said advanced prices.

It was agreed that the total amount of orders given prior to October 14th, and filled subsequently at said advanced prices, was \$1604.99 at list prices; that the difference between the price originally agreed upon and said advanced price was \$130.08; that the amount of orders given after October 14th, and filled at said advanced price, was \$7380.13 at list prices; and that the difference between the price originally agreed upon and said advanced price was \$578.15.

The judge found, as of fact, that the contract was made as alleged.

The plaintiffs asked the judge to rule that the defendant, having, by its letters of October 14th and 20th, repudiated its

contract of July 8th, and refused to deliver any more goods under said contract, had committed a breach of that contract ; that the plaintiffs had not waived said breach ; that, for said breach, the defendant was liable in this action for the damages thereby sustained by the plaintiffs ; and that there was no rescission of the contract of July 8th disclosed by the correspondence. The judge declined so to rule.

The defendant contended that there was no contract between the parties ; that if their dealings resulted in a contract, no action could be maintained thereon, under the Statute of Frauds ; that the defendant's letter of October 14th, and the plaintiffs' telegram of October 24th, constituted a rescission of the same ; that the defendant's revocation of the contract, if any, by said letter of October 14th, was lawful ; that the payment of said advanced prices were voluntary payments ; and that, upon all the evidence, the plaintiffs could not maintain this action.

The judge ruled that the payment of said advanced prices by the plaintiffs was a voluntary payment ; and on this ground alone found for the defendant.

If the judge erred in said ruling, or refusal to rule, and if, upon the foregoing evidence and findings, the plaintiffs could maintain their action, judgment was to be entered in their favor for the sum of \$130.08, or the sum of \$578.15, or both sums, as the Court might decide the plaintiffs entitled ; otherwise, for the defendant.

D. C. Linscott for the plaintiffs.

S. H. Tyng for the defendant.

FIELD, J. We infer from the report that the Court found that the contract was not merely an offer by the defendant to sell, which would have been revocable at any time, except so far as it had been accepted by the plaintiffs in giving orders, and would thus be a contract only to the extent of those orders ; but that it was a contract whereby the plaintiffs agreed to buy, and the defendant agreed to sell, such of the goods dealt in by the defendant as the plaintiffs needed in their trade during the time specified. See *Dickinson v. Dodds*, 2 Ch. D. 463. The plaintiffs were bound in law to pay for the goods sent after the new agreement was made according to the prices stipulated in that agreement. In this Commonwealth the delivery of the goods by the defendant under the new agreement, whether they were sent to fill the orders given before October 14th, or the orders given after, is considered a sufficient consideration for the new promise of the plaintiff. Whether the new agreement was substituted for the old, and thus operated as a rescission

or discharge of it, must be determined by the intention of the parties, to be ascertained from their correspondence and conduct. *Munroe v. Perkins*, 9 Pick. 298 ; *Cummings v. Arnold*, 3 Met. 486 ; *Stearns v. Hall*, 9 Cush. 31 ; *Holmes v. Doane*, 9 Cush. 135 ; *Peck v. Requa*, 13 Gray, 407 ; *Lawrence v. Davey*, 28 Vt. 264 ; *Stewart v. Keteltas*, 36 N.Y. 388 ; *Cooke v. Murphy*, 70 Ill. 96 ; *Moore v. Detroit Locomotive Works*, 14 Mich. 266.

If we assume that the original agreement was sufficiently definite to constitute a valid contract, as it was a continuing contract, the parties could clearly substitute for it a new contract, which should determine their rights and liabilities after the new contract was made, and this would operate as a waiver or discharge of the first contract as to future orders and deliveries, unless it appeared that the first contract had been broken by an absolute refusal on the part of the defendant to perform it, and that the new contract was not intended to be a discharge of the breach. As to the orders given before October 14th, which the defendant had refused to fill, if the new contract by its terms covered those, we think the same rule holds. If the parties agreed that these orders should be filled at the prices stipulated for in the new contract, without considering whether the new agreement would of itself be a discharge of these partial breaches, performance of the new agreement would operate as a discharge, or an accord and satisfaction, unless it appeared that such was not the intention of the parties. Such a substituted agreement *prima facie* takes the place of the original agreement as to everything remaining unperformed.

Our construction of the correspondence and conduct of the parties is, that it was not understood or intended by both parties that the plaintiffs should retain their right of action, if they had any, for the alleged breach of the original contract.

Judgment for the defendant.

GEORGE R. KING v. DULUTH, MISSABE & NORTHERN RAILWAY COMPANY.

IN THE SUPREME COURT OF MINNESOTA, JUNE 28, 1895.

[*Reported in 61 Minnesota Reports 482.*]

APPEAL by defendant from an order of the District Court for St. Louis County, Ensign, J., overruling a demurrer to both causes of action in the complaint. Reversed as to the first cause of action. Affirmed as to the second cause of action.

Joseph B. Cotton and *George Welwood Murray* for appellant.

J. L. Washburn and *L. E. Judson, Jr.*, for respondent.

START, C.J.¹ This is an action brought by the plaintiff, as surviving partner of the firm of Wolf & King, to recover a balance claimed to be due for the construction of a portion of the defendant's line of railway. The complaint alleges two supposed causes of action, to each of which the defendant demurred on the ground that neither states facts constituting a cause of action. From an order overruling the demurrer the defendant appealed.

1. The complaint for a first cause of action alleges, among other things, substantially, that in January, 1893, the firm of Wolf & King entered into three written contracts with the president and representative of the defendant for the grading, clearing, grubbing, and construction of the roadbed of its railway for a certain stipulated price for each of the general items of work and labor to be performed; that the firm entered upon the performance of such contracts, but in the latter part of February, 1893, in the course of such performance, unforeseen difficulties of construction, involving unexpected expenses, and such as were not anticipated by the parties to the contracts, were encountered. That the firm of Wolf & King found that by reason of such difficulties it would be impossible to complete the contracts within the time agreed upon without employing an additional and an unusual force of men and means, and at a loss of not less than \$40,000 to them, and consequently they notified the representative of the defendant that they would be unable to go forward with the contracts, and unable to complete or prosecute the work. Thereupon such representative entered into an agreement with them modifying the written contracts, whereby he agreed that if they would "go forward and prosecute the said work of construction, and complete said contract," he would pay or cause to be paid to them an additional consideration therefor, up to the full extent of the cost of the work, so that they should not be compelled to do the work at a loss to themselves; that in consideration of such promise they agreed to forward the work rapidly, and force the same to completion, in the manner provided in the specifications for such work, and referred to in such contracts. That in reliance upon the agreement modifying the former contracts, and in reliance upon such former contracts, they did prosecute and complete the work in accordance with the contracts as so modified by the oral agreement, to the satisfaction of all parties in interest. That such contracts and the oral contract modifying them were duly ratified by the defendant, and that the actual cost of such construction was not less than \$30,000 in excess of the

¹ Buck, J., took no part.

stipulated amount provided for in the original written contracts.

It is claimed by appellant that the complaint shows no consideration for the alleged promise to pay extra compensation for the work ; that it is at best simply a promise to pay the contractors an additional compensation if they would do that which they were already legally bound to do. The general rule is that a promise of a party to a contract to do, or the doing of that which he is already under a legal obligation to do by the terms of the contract, is not a valid consideration to support the promise of the other party to pay an additional compensation for such performance. 1 Chitty, Cont. 60 ; Pollock, Cont. 176 (161) ; Leake, Cont. 621. In other words, a promise by one party to a subsisting contract to the opposite party to prevent a breach of the contract on his part is without consideration. The following cases sustain and illustrate the practical application of the rule. *Ayers v. Chicago, R. I. & P. R. Co.*, 52 Iowa, 478, 3 N. W. 522 ; *McCarty v. Hampton B. Ass'n*, 61 Iowa, 287, 16 N. W. 114 ; *Lingenfelder v. Wainwright B. Co.*, 103 Mo. 578, 15 S. W. 844 ; *Vanderbilt v. Schreyer*, 91 N. Y. 392 ; *Reynolds v. Nugent*, 25 Ind. 328 ; *Robinson v. Jewett*, 116 N. Y. 40, 22 N. E. 224 ; *Wimer v. Worth Tp.*, 104 Pa. St. 317.

If the allegations of the complaint, when taken together, are in legal effect simply that the contractors, finding by the test of experience in the prosecution of the work that they had agreed to do that which involved a greater expenditure of money than they calculated upon, that they had made a losing contract, and thereupon notified the opposite party that they were unable to proceed with the work, and he promised them extra compensation if they would perform their contract, the case is within the rule stated, and the demurrer ought to have been sustained as to the first cause of action.

It is claimed, however, by the respondent, that such is not the proper construction of the complaint, and that its allegations bring the case within the rule adopted in several States, and at least approved in our own, to the effect that if one party to a contract refuses to perform his part of it unless promised some further pay or benefit than the contract provides, and such promise is made by the other party, it is supported by a valid consideration, for the making of the new promise shows a rescission of the original contract and the substitution of another. In other words, that the party, by refusing to perform his contract, thereby subjects himself to an action for damages, and the opposite party has his election to bring an action for the recovery of such damages or to accede to the demands of his

adversary and make the promise ; and if he does so it is a relinquishment of the original contract and the substitution of a new one. *Munroe v. Perkins*, 9 Pick. 298 ; *Bryant v. Lord*, 19 Minn. 342 (396) ; *Moore v. Detroit L. Works*, 14 Mich. 266 ; *Goebel v. Linn*, 47 Mich. 489, 11 N. W. 284 ; *Rogers v. Rogers*, 139 Mass. 440, 1 N. E. 122.

The doctrine of these cases as it is frequently applied does not commend itself either to our judgment or our sense of justice, for where the refusal to perform and the promise to pay extra compensation for performance of the contract are one transaction, and there are no exceptional circumstances making it equitable that an increased compensation should be demanded and paid, no amount of astute reasoning can change the plain fact that the party who refuses to perform, and thereby coerces a promise from the other party to the contract to pay him an increased compensation for doing that which he is legally bound to do, takes an unjustifiable advantage of the necessities of the other party. To hold, under such circumstances, that the party making the promise for extra compensation is presumed to have voluntarily elected to relinquish and abandon all of his rights under the original contract, and to substitute therefor the new or modified agreement, is to wholly disregard the natural inference to be drawn from the transaction, and invite parties to repudiate their contract obligations whenever they can gain thereby.

There can be no legal presumption that such a transaction is a voluntary rescission or modification of the original contract, for the natural inference to be drawn from it is otherwise in the absence of any equitable considerations justifying the demand for extra pay. In such a case the obvious inference is that the party so refusing to perform his contract is seeking to take advantage of the necessities of the other party to force from him a promise to pay a further sum for that which he is already legally entitled to receive. Surely it would be a travesty on justice to hold that the party so making the promise for extra pay was estopped from asserting that the promise was without consideration. A party cannot lay the foundation of an estoppel by his own wrong. If it be conceded that by the new promise the party obtains that which he could not compel—viz., a specific performance of the contract by the other party—still the fact remains that the one party has obtained thereby only that which he was legally entitled to receive, and the other party has done only that which he was legally bound to do. How, then, can it be said that the legal rights or obligations of the party are changed by the new promise ? It is entirely com-

petent for the parties to a contract to modify or to waive their rights under it, and ingraft new terms upon it, and in such a case the promise of one party is the consideration for that of the other ; but where the promise to the one is simply a repetition of a subsisting legal promise there can be no consideration for the promise of the other party, and there is no warrant for inferring that the parties have voluntarily rescinded or modified their contract.

But where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulties in the performance of the contract, which were not known or anticipated by the parties when the contract was entered into, and which cast upon him an additional burden not contemplated by the parties, and the opposite party promises him extra pay or benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid consideration. In such a case the natural inference arising from the transaction, if unmodified by any equitable considerations, is rebutted, and the presumption arises that by the voluntary and mutual promises of the parties their respective rights and obligations under the original contract are waived, and those of the new or modified contract substituted for them. Cases of this character form an exception to the general rule that a promise to do that which a party is already legally bound to do is not a sufficient consideration to support a promise by the other party to the contract to give the former an additional compensation or benefit. 1 Whart. Cont. § 500.

On the other hand, where no unforeseen additional burdens have been cast upon a party refusing to perform his contract, which make his refusal to perform, unless promised further pay, equitable, and such refusal and promise of extra pay are all one transaction, the promise of further compensation is without consideration, and the case falls within the general rule, and the promise cannot be legally enforced, although the other party has completed his contract in reliance upon it. This proposition, in our opinion, is correct on principle and supported by the weight of authority.

What unforeseen difficulties and burdens will make a party's refusal to go forward with his contract equitable, so as to take the case out of the general rule and bring it within the exception, must depend upon the facts of each particular case. They must be substantial, unforeseen, and not within the contemplation of the parties when the contract was made. They need not be such as would legally justify the party in his refusal to perform his contract, unless promised extra pay, or to justify a

court of equity in relieving him from the contract ; for they are sufficient if they are of such a character as to render the party's demand for extra pay manifestly fair, so as to rebut all inference that he is seeking to be relieved from an unsatisfactory contract, or to take advantage of the necessities of the opposite party to coerce from him a promise for further compensation. Inadequacy of the contract price, which is the result of an error of judgment, and not of some excusable mistake of fact, is not sufficient.

The cases of *Meech v. City of Buffalo*, 29 N. Y. 198, where the unforeseen difficulty in the execution of the contract was quicksand, in place of expected ordinary earth excavation, and *Michaud v. MacGregor*, *supra*, p. 198, 63 N. W. 479, where the unforeseen obstacles were rocks below the surface of the lots to be excavated, which did not naturally belong there, but were placed there by a third party, and of the existence of which both parties to the contract were ignorant when the contract was made, are illustrations of what unforeseen difficulties will take a case out of the general rule.

Do the allegations of fact contained in plaintiff's first alleged cause of action bring his case within the exception? Clearly not ; for eliminating all conclusions, and considering only the facts alleged, there is nothing to make the case exceptional, other than the general statement that the season was so extraordinary that in order to do the stipulated work it would require great and unusual expense, involving a large use of powder and extra time and labor for the purpose of blasting out the frozen earth and other material which was encountered. What the character of this material was we are not told, or what the other extraordinary conditions of the ground were. The Court will take judicial knowledge of the fact that frozen ground on the Missabe Range, where the work was to be performed, in the month of February, is not unusual or extraordinary. It was a matter which must have been anticipated by the parties, and taken into consideration by them when this contract was made. The most that can be claimed from the allegations of the complaint is that the contractors had made a losing bargain, and refused to complete their contract, and the defendant, by its representative, promised them that if they would go forward and complete their contract it would pay them an additional compensation, so that the total compensation should be equal to the actual cost of the work.

2. The second cause of action is supported by a different and a valid consideration. It fairly appears from the allegations of the complaint as to this cause of action that the defendant, by

changing its line and by its defaults, had so far delayed the work of construction as to legally excuse the contractors from their obligation to complete the work within the time originally agreed upon, and that to execute the work within such time would involve an additional expense. Thereupon, in consideration of their waiving the defaults and the delays occasioned by the defendant, and promising to complete the work in time, so that it could secure the bonds,¹ it promised to pay or give to them the extra compensation. This was a legal consideration for such promise, and the allegations of the second general subdivision of the complaint state a cause of action.

So much of the order appealed from as overruled the defendant's demurrer to the supposed first cause of action in the plaintiff's complaint must be reversed, and as to so much of it as overruled the demurrer to the second cause of action it must be affirmed, and the case remanded to the District Court of the county of St. Louis with the direction to modify the order appealed from so as to sustain the demurrer as to the first cause of action, with or without leave to the plaintiff to amend, as such Court may deem to be just.

So ordered.

SHADWELL v. SHADWELL AND ANOTHER, EXECUTORS, ETC.

IN THE COMMON PLEAS, NOVEMBER 26, 1860.

[*Reported in 30 Law Journal Reports, Common Pleas 145.*]

THE declaration stated that the testator, in his lifetime (in consideration that the plaintiff would marry Ellen Nicholl), agreed with and promised the plaintiff, who was then unmarried, in the terms contained in a writing in the form of a letter, addressed by the said testator to the plaintiff, which writing was and is in the words, letters, and figures following—that is to say :

“GRAY'S INN, August 11, 1838.

“MY DEAR LANCEY: I am glad to hear of your intended marriage with Ellen Nicholl; and, as I promised to assist you at starting, I am happy to tell you that I will pay to you £150 yearly during my life, and until your annual income derived from your profession of a Chancery barrister shall amount to

¹ See *Grant v. Duluth, M. & N. Ry. Co.*, *supra*, pp. 396-97.

600 guineas, of which your own admission will be the only evidence that I shall receive or require.

“ Your ever affectionate uncle,

“ CHARLES SHADWELL.”

Averment that the plaintiff did all things necessary, and all things necessary happened, to entitle him to have the said testator pay to him eighteen of the said yearly sums of £150 each respectively, and that the time for the payment of each of the said eighteen yearly sums elapsed after he married the said Ellen Nicholl, and in the lifetime of the said testator, and that the plaintiff's annual income derived from his profession of a Chancery barrister never amounted to 600 guineas, which he was always ready and willing to admit and state to the said testator, and the said testator paid to the plaintiff twelve of the said eighteen yearly sums which first became payable, and part, to wit, £12 of the thirteenth ; yet the said testator made default in paying the residue of the said thirteenth yearly sum, which residue is still in arrear and unpaid, and in paying the five of the said eighteen yearly sums which last became payable, and the said five sums are still in arrear and unpaid.

Fourth plea, that before and at the time of the making of the supposed agreement and promise in the declaration mentioned, the said marriage had been and was without any request by or on the part of the testator touching the said intended marriage, but at the request of the plaintiff, intended and agreed upon between the plaintiff and the said Ellen Nicholl, of which the testator before and at the time of making the supposed agreement and promise also had notice, and the said marriage was after the making of the supposed agreement and promise duly had and solemnized as in the declaration mentioned, at the request of the plaintiff, and without the request of the testator. And the defendants further say, that save and except as expressed and contained in the writing set forth in the declaration, there never was any consideration for the supposed agreement and promise in the declaration mentioned, or for the performance thereof.

Fifth plea, to part of the claim of the plaintiff, to wit, to so much thereof as accrued due in and after the year 1855, the defendants say that although the supposed agreement and promise in the declaration mentioned were made upon the terms then agreed on by the plaintiff and the testator, that the plaintiff should continue in practice and carry on the profession of such Chancery barrister as aforesaid, and should not abandon the same ; yet that after the making of the said agreement and

promise, and before the accruing of the supposed causes by this plea pleaded to and in the declaration mentioned, or any part thereof, the plaintiff voluntarily, and without the leave or license of the testator, relinquished and gave up and abandoned the practice of the said profession of a Chancery barrister, which before and at the time of the said making of the said supposed agreement and promise, he had so carried on as aforesaid; and although the plaintiff could and might, during the time in this plea and in the declaration mentioned, have continued to practise and carry on that profession as aforesaid, yet the plaintiff, after such abandonment thereof, never was ready and willing to practise the same as aforesaid, but practised only as a revising barrister—that is to say, as a barrister appointed yearly to revise the list of voters for the year, for the county of Middlesex, according to the provisions of the statutes in that behalf, by holding open courts for such revision at the times and places in that behalf provided by the said statutes.

Second replication to the fourth plea, that the said agreement declared on was made in writing, signed by the said testator, and was and is in the words, letters, and figures following, and in none other—that is to say [setting out the letter as in the declaration above]. Averment that the plaintiff afterward married the said Ellen Nicholl, relying on the said promise of the said testator, which at the time of the said marriage was in full force, not in any way vacated or revoked, and that he so married while his annual income derived from his profession of a Chancery barrister did not amount, and was not by him admitted to amount, to 600 guineas.

Second replication to the fifth plea, that the said agreement declared on was in writing, signed by the said testator, and was and is in the words, letters, and figures set out in the next preceding replication, and in none other, and that the terms upon which it is in the fifth plea alleged that the said agreement and promise were made were no part of the agreement and promise declared on, and the performance of them by the plaintiff was not a condition precedent to the plaintiff's right to be paid the said annuity. Demurrers to the replications to the fourth and fifth pleas. Joinder in demurrer.

Bullar in support of the demurrers.

V. Harcourt in support of the replication.

ERLE, C.J., now delivered the judgment of himself and Keating, J. The question raised by the demurrer to the replication to the fourth plea is, whether there was a consideration to support the action on the promise to pay an annuity of £150 per annum. If there be such a consideration it is a marriage;

therefore the promise is within the Statute of Frauds, and the consideration must appear in the writing containing the promise—that is, in the letter of August 11th, 1838—and in the surrounding circumstances to be gathered therefrom, together with the averments on the record. The circumstances are that the plaintiff had made an engagement to marry Ellen Nicholl, his uncle promising him to assist him at starting, by which, as I understand the words, he meant on commencing his married life. Then the letter containing the promise declared on is said to specify what the assistance would be—namely, £150 per annum during the uncle's life, and until the plaintiff's professional income should be acknowledged by him to exceed 600 guineas; and a further averment, that the plaintiff, relying upon his promise, without any revocation on the part of the uncle, did marry Ellen Nicholl. Then, do these facts show that the promise was in consideration, either of the loss to be sustained by the plaintiff, or the benefit to be derived from the plaintiff to the uncle at his, the uncle's request? My answer is in the affirmative. First, do these facts show a loss sustained by the plaintiff at the uncle's request? When I answer this in the affirmative, I am aware that a man's marriage with the woman of his choice is in one sense a boon, and in that sense the reverse of a loss; yet, as between the plaintiff and the party promising an income to support the marriage, it may be a loss. The plaintiff may have made the most material changes in his position, and have induced the object of his affections to do the same, and have incurred pecuniary liabilities resulting in embarrassments, which would be in every sense a loss if the income which had been promised should be withheld; and if the promise was made in order to induce the parties to marry, the promise so made would be, in legal effect, a request to marry. Secondly, do these facts show a benefit derived from the plaintiff to the uncle at his request? In answering again in the affirmative, I am at liberty to consider the relation in which the parties stood, and the interest in the *status* of the nephew which the uncle declares. The marriage primarily affects the parties thereto; but in the second degree it may be an object of interest with a near relative, and in that sense a benefit to him. This benefit is also derived from the plaintiff at the uncle's request, if the promise of the annuity was intended as an inducement to the marriage; and the averment that the plaintiff, relying on the promise, married, is an averment that the promise was one inducement to the marriage. This is a consideration averred in the declaration, and it appears to me to be expressed in the letter, construed with the surrounding

circumstances. No case bearing a strong analogy to the present was cited, but the importance of enforcing promises which have been made to induce parties to marry has been often recognized, and the cases of *Montefiori v. Montefiori* and *Bold v. Hutchinson* are examples. I do not feel it necessary to add anything about the numerous authorities referred to in the learned arguments addressed to us, because the decision turns on a question of fact, whether the consideration for the promise is proved as pleaded. I think it is, and therefore my judgment on the first demurrer is for the plaintiff. The second demurrer raises the question, whether the plaintiff's continuing at the bar was made a condition precedent to the right to the annuity. I think not. The uncle promises to continue the annuity until the professional income exceeds the sum mentioned, and I find no stipulation that the annuity shall cease if the professional diligence ceases. My judgment on this demurrer is also for the plaintiff, and I should state that this is the judgment of my Brother Keating and myself, my Brother Byles differing with us.

BYLES, J. I am of opinion that the defendant is entitled to the judgment of the Court on the demurrer to the second replication to the fourth plea. It is alleged by the fourth plea that the defendant's testator never requested the plaintiff to enter into the engagement to marry, or to marry, and that there never was any consideration for the testator's promise, except what may be collected from the letter itself set out in the declaration. The inquiry, therefore, narrows itself to this question, Does the letter itself disclose any consideration for the promise? The consideration relied on by the plaintiff's counsel being the subsequent marriage of the plaintiff, I think the letter discloses no consideration. It is in these words [his Lordship read it]. It is by no means clear that the words "at starting" mean "on marriage with Ellen Nicholl," or with any one else. The more natural meaning seems to me to be "at starting in the profession," for it will be observed that these words are used by the testator in reciting a prior promise, made when the testator had not heard of the proposed marriage with Ellen Nicholl, or, so far as appears, heard of any proposed marriage. This construction is fortified by the consideration that the annuity is not, in terms, made to begin from the marriage, but, as it should seem, from the date of the letter. Neither is it in terms made defeasible if Ellen Nicholl should die before marriage. But even on the assumption that the words "at starting" mean "on marriage," I still think that no consideration appears sufficient to sustain the promise. The promise is one which, by law, must be in writing; and the fourth plea shows that no consideration

or request, *dehors* the letter, existed, and, therefore, that no such consideration or request can be alluded to by the letter. Marriage of the plaintiff at the testator's express request would be, no doubt, an ample consideration, but marriage of the plaintiff without the testator's request is no consideration to the testator. It is true that marriage is, or may be a detriment to the plaintiff ; but detriment to the plaintiff is not enough, unless it either be a benefit to the testator or be treated by the testator as such, by having been suffered at his request. Suppose a defendant to promise a plaintiff, "I will give you £500 if you break your leg," would that detriment to the plaintiff, should it happen, be any consideration ? If it be said that such an accident is an involuntary mischief, would it have been a binding promise if the testator had said, "I will give you £100 a year while you continue in your present chambers" ? I conceive that the promise would not be binding for want of a previous request by the testator. Now, the testator in the case before the Court derived, so far as appears, no personal benefit from the marriage. The question, therefore, is still further narrowed to this point, Was the marriage at the testator's request ? Express request there was none. Can any request be implied ? The only words from which it can be contended that it is to be implied are the words, "I am glad to hear of your intended marriage with Ellen Nicholl." But it appears from the fourth plea that that marriage had already been agreed on, and that the testator knew it. These words, therefore, seem to me to import no more than the satisfaction of the testator at the engagement as an accomplished fact. No request can, as it seems to me, be inferred from them. And, further, how does it appear that the testator's implied request, if it could be implied, or his promise, if that promise alone would suffice, or both together, were intended to cause the marriage, or did cause it, so that the marriage can be said to have taken place at the testator's request, or, in other words, in consequence of that request ? It seems to me, not only that this does not appear, but that the contrary appears ; for the plaintiff before the letter had already bound himself to marry by placing himself not only under a moral, but under a legal obligation to marry, and the testator knew it. The well-known cases which have been cited at the bar in support of the position that a promise, based on the consideration of doing that which a man is already bound to do, is invalid, apply to this case ; and it is not necessary, in order to invalidate the consideration, that the plaintiff's prior obligation to afford that consideration should have been an obligation to the defendant. It may have been an obligation to a third person.

See *Herring v. Dorell*¹ and *Atkinson v. Settree*.² The reason why the doing what a man is already bound to do is no consideration, is not only because such a consideration is in judgment of law of no value, but because a man can hardly be allowed to say that the prior legal obligation was not his determining motive. But whether he can be allowed to say so or not, the plaintiff does not say so here. He does, indeed, make an attempt to meet this difficulty by alleging, in the replication to the fourth plea, that he married relying on the testator's promise; but he shrinks from alleging that though he had promised to marry before the testator's promise to him, nevertheless, he would have broken his engagement, and would not have married without the testator's promise. A man may rely on encouragements to the performance of his duty who yet is prepared to do his duty without those encouragements. At the utmost, the allegation that he relied on the testator's promise seems to me to import no more than that he believed the testator would be as good as his word. It appears to me, for these reasons, that this letter is no more than a letter of kindness, creating no legal obligation. In their judgment on the other portions of the record I agree with the rest of the Court.

Judgment for the plaintiff.

SCOTSON AND OTHERS v. PEGG.

IN THE EXCHEQUER, JANUARY 28, 1861.

[*Reported in 6 Hurlstone & Norman 295.*]

DECLARATION. For that in consideration that the plaintiffs, at the request of the defendant, would deliver to the defendant a certain cargo of coals, then on board a certain ship of the plaintiffs, the defendant to take the same from and out of the said ship, the defendant promised the plaintiffs to unload and discharge the same at the rate of 49 tons of the said coals during each working day, after the said ship was ready to unload and discharge the same. And although the plaintiffs did afterward deliver the said cargo to the defendant, and were always ready and willing to suffer and permit him to take the same from and out of the said ship as aforesaid, and although all things were done, and conditions precedent to be performed by the plaintiffs were performed by the plaintiffs, to entitle the

¹ 8 Dowl. P. C. 604.

² Willes, 482.

plaintiffs to a performance of the said promise by the defendant. Yet the defendant did not unload and discharge the said cargo at the rate aforesaid during each working day after the said ship was ready to unload and discharge the same, and the defendant wholly neglected and refused so to do for five days longer and more than he ought to have done according to his said promise; and the plaintiffs were put to expense in and about the maintaining and keeping the master and crew of the said ship, etc.

Plea. That before the making of the said promise the plaintiffs, by another contract made by and between the plaintiffs and certain other persons, agreed with the said certain other persons, for certain freight therefore payable by the said other persons to the plaintiffs, to carry the said coals on a certain voyage in the said ship, and to deliver the said coals to the order of the said other persons, which contract was in full force thence, until, and at the time of the making of the said promise and the delivery of the said coals. And the defendant says that before the making of the said promise, and after the making the said other contract, and while the last-mentioned contract was in force, he bought the coals of the said other persons, who thereupon ordered the plaintiffs to deliver the same to the defendant, under and according to the said contract with the said other persons, of which the plaintiffs before the making of the said promise had notice. And the defendant says that the said order was in full force until and at the time of the making of the said promise, and thence until and at the delivery of the said coals, of which the plaintiffs always had notice. And the defendant says the then future delivery to the defendant of the said coals on the terms in the declaration mentioned, which was the consideration for the said promise, was the delivery of the said coals to the order of the said other persons, which the plaintiffs had by the said contract with such other persons so agreed to make as aforesaid, and which before and at the time of the making of the said promise, until and at the time of the said delivery, the plaintiffs were, by, under, and according to the said contract with the said other persons bound to make as aforesaid. And the defendant says that there never was any consideration for his said promise other than the doing of that which by the said contract with the said other persons they the plaintiffs, before and at the time of the making of the said promise, and thence until the plaintiffs did it were bound to do.

Demurrer and joinder therein.

Dowdeswell in support of the demurrer. The plea is bad. It admits a promise by the defendant to unload the coal at the

rate of 49 tons a day ; and the delivery of the same by the plaintiffs is a sufficient consideration to support the promise. The defendant, having made an express promise, is not relieved from his obligation to perform it because the plaintiff has entered into a previous contract with another person to deliver to his order. The defence would be available under the general issue ; but the plea was allowed on the authority of *Shadwell v. Shadwell*, C. B., M. T. 1860. This is an attempt to question the decisions on this subject, which have been uniform from the time of *Jesson v. Solly*, 4 Taunt. 52.

The Court then called on

C. Pollock to support the plea. There is no consideration to support the promise. The plea shows that the consideration alleged in the declaration is the doing that which the plaintiffs, by their contract with other persons, were bound to do. The charter party only specifies the time and mode in which the cargo is to be discharged, as between the charterer and ship-owner. [MARTIN, B. You must establish this, that if a person says to another, "The goods which I have in my ship are yours, but I will not deliver them unless you pay my lien for freight," which the latter agrees to do, the delivery of the goods is no consideration to support the promise to pay.] The cargo is the property of the defendant, and the agreement to deliver to him that which he was entitled to have was a *nudum pactum*. In *Black. Com.*, Vol. II., p. 450, it is said : "If a man buys his own goods in a fair or market, the contract of sale shall not bind him, so that he shall render the price, unless the property had been previously altered by a former sale." [WILDE, B. That is the case of a purchase of goods, the property in them being already in the purchaser, but here the plaintiffs will not deliver the cargo to the defendant, whereupon the defendant says, "If you will deliver it to me, I will discharge it in a certain manner."] The plaintiffs were under a prior legal obligation to deliver the cargo, and therefore the promise to the defendant to do the same thing was void. Where a plaintiff discharged one of two joint debtors, it was held that a promise by a third person to pay the debt, in order to obtain the discharge of the other debtor, was void for want of consideration. *Herring v. Dorell*, 8 Dowl. P. C. 604. So if A. be illegally arrested by B. for debt, a promise by C. to pay the debt claimed by B., in consideration of B.'s releasing A. out of custody, is void. *Atkinson v. Settree*, Willes, 482. [WILDE, B. In those cases there was a legal right to the performance of the very act which was bargained for ; it is not so here. MARTIN, B. Suppose a man promised to marry on a certain day, and before that day

arrived he refused, on the ground that his income was not sufficient, whereupon the father of the intended wife said to him : "If you will marry my daughter, I will allow you £1000 a year." Could not that contract be enforced?] There would be no consideration for such a promise, the party being already under an obligation to marry. A promise by a captain to pay his sailors increased wages for performing their duty during a storm is void for want of consideration. [MARTIN, B. That proceeds on the ground of public policy. WILDE, B. It often happens that when goods arrive in a ship, and there is a lien upon them, a merchant who wants to get possession of the goods promises to pay the lien if the master will deliver them to him. A man may be bound by his contract to do a particular thing, but while it is doubtful whether or no he will do it, if a third person steps in and says, "I will pay you if you will do it," the performance is a valid consideration for the payment. MARTIN, B. If a builder was under a contract to finish a house on a particular day, and the owner promised to pay him a sum of money if he would do it, what is to prevent the builder from recovering the money?] As the plaintiffs would be doing a wrong by not fulfilling their contract, it must be presumed that the prior legal obligation, and not the subsequent promise, was the motive for their delivery of the cargo.

MARTIN, B. I am of opinion that the plea is bad, both on principle and in law. It is bad in law because the ordinary rule is, that any act done whereby the contracting party receives a benefit is a good consideration for a promise by him. Here the benefit is the delivery of the coals to the defendant. It is consistent with the declaration that there may have been some dispute as to the defendant's right to have the coals, or it may be that the plaintiffs detained them for demurrage ; in either case there would be good consideration that the plaintiffs, who were in possession of the coals, would allow the defendant to take them out of the ship. Then is it any answer that the plaintiffs had entered into a prior contract with other persons to deliver the coals to their order upon the same terms, and that the defendant was a stranger to that contract? In my opinion it is not. We must deal with this case as if no prior contract had been entered into. Suppose the plaintiffs had no chance of getting their money from the other persons, who might perhaps have become bankrupt. The defendant gets a benefit by the delivery of the coals to him, and it is immaterial that the plaintiffs had previously contracted with third parties to deliver to their order.

WILDE, B. I am also of opinion that the plaintiffs are en-

titled to judgment. The plaintiffs say, that in consideration that they would deliver to the defendant a cargo of coals from their ship, the defendant promised to discharge the cargo in a certain way. The defendant, in answer, says: "You made a previous contract with other persons that they should discharge the cargo in the same way, and therefore there is no consideration for my promise." But why is there no consideration? It is said, because the plaintiffs, in delivering the coals, are only performing that which they were already bound to do. But to say that there is no consideration is to say that it is not possible for one man to have an interest in the performance of a contract made by another. But if a person chooses to promise to pay a sum of money in order to induce another to perform that which he has already contracted with a third person to do, I confess I cannot see why such a promise should not be binding. Here the defendant, who was a stranger to the original contract, induced the plaintiffs to part with the cargo, which they might not otherwise have been willing to do, and the delivery of it to the defendant was a benefit to him. I accede to the proposition that, if a person contracts with another to do a certain thing, he cannot make the performance of it a consideration for a new promise to the same individual. But there is no authority for the proposition that where there has been a promise to one person to do a certain thing, it is not possible to make a valid promise to another to do the same thing. Therefore, deciding this matter on principle, it is plain to my mind that the delivery of the coals to the defendant was a good consideration for his promise, although the plaintiffs had made a previous contract to deliver them to the order of other persons.

Judgment for the plaintiffs.¹

RICHARD T. MERRICK AND THOMAS J. DURANT v.
DE WITT C. GIDDINGS.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA,
JANUARY 18, 1882.

[Reported in 1 Mackey 394.]

THE case is stated in the opinion.

John Selden for plaintiffs.

F. P. Cuppy and *James Coleman* for defendant.

JAMES, J., delivered the opinion of the Court.

The declaration in this case alleges, substantially, that the

¹ Pollock, C.B., and Channell, B., were absent.

plaintiffs were retained by the State to aid by certain legal proceedings, mainly before the Supreme Court of the United States, in the recovery of certain bonds, or the proceeds thereof, in the possession of certain persons without right, and belonging to said State, upon a contingent compensation of 20 per centum of the amount of such of the said bonds or proceeds as might, by means of such aid, be in any way recovered by said State ; that while plaintiffs were acting under that retainer and conducting those proceedings, the defendant, with plaintiffs' consent, was retained by said State as her other and further attorney and counsel, but upon a separate and additional compensation to be paid him, to aid in the recovery and collection of said bonds or proceeds ; that afterward, and while plaintiffs and defendant were respectively so employed, the defendant, with the consent of said State, and in consideration that plaintiffs would, by means of their legal proceedings, cause the title of said State to said bonds to be therein adjudged and decreed ; but would, with the consent of the State, refrain from any attempt to reduce them into possession, and suffered the defendant, with like consent, to reduce them into possession for said State, agreed with plaintiffs that he would retain for their sole use, and pay over to them, out of any of the said bonds or proceeds thereafter collected or recovered by him, as such other attorney, into his actual possession, 20 per centum thereof ; that plaintiffs, with the consent of the State, and by means of their proceedings before the Supreme Court, did procure the title of the State to be adjudged as required, and did refrain as agreed, and did, with like consent, permit defendant alone, as such other attorney, to reduce said bonds into actual possession for the State ; and defendant did, by means of the adjudication procured by plaintiffs, and by force of such refraining and possession of the plaintiffs, recover into his actual possession for the said State proceeds of said bonds to the amount of \$339,240.12, but did not retain for the use of or pay over to the plaintiffs 20 per centum, or any part, of such proceeds, to the damage of plaintiffs in the sum of \$70,000. To this are added the common counts for money payable by defendant to plaintiffs, and money received by defendant for the use of plaintiffs.

For the sake of more intelligible brevity, it may be repeated that the cause of action set forth in the special count is a breach of defendant's promise to retain and pay over to plaintiffs, out of moneys which should be, and which actually were collected by him, the fee which the State of Texas had agreed to pay them ; the consideration for this promise being the performance of certain services by them, and their forbearance to perform

themselves, and their suffering defendant to perform certain other services.

Four bills of exception were signed at the trial, but all of them are, in proper form, made part of the last one, and the hearing in this Court has been upon the latter only. It shows that "after the evidence had been given, as set forth in the foregoing bills of exception, . . . the plaintiffs announced that they rested their case. Thereupon the defendant prayed the Court to instruct the jury that upon the whole evidence their verdict should be for the defendant." The bill further sets forth certain reasons on which the Court based its conclusions, and then adds: "And the Court, therefore, gave to the jury the instruction prayed, and the jury, under instruction, returned a verdict for the defendant."

It is not stated in terms that the bills of exception contain the "whole" of the evidence admitted at the trial; but a statement that the plaintiffs rested their case "after the evidence had been given as set forth in the foregoing bills" may be accepted as equivalent. Besides, a presumption that other evidence was given by the plaintiffs would be a presumption against the decision of the Court; in other words, that error had been committed; and this is not admissible. The bills of exception describe the evidence, of course, only as "tending to show;" but the instruction to the jury answers the same purpose as a demurrer to evidence, and should be tested by the same rule. "A demurrer to evidence admits not only the facts stated therein, but also every conclusion which a jury might fairly and reasonably infer therefrom." *Parks v. Ross*, 11 How. 362 (373); *Richardson v. The City of Boston*, 19 How. 263 (268). In accordance with this rule we have to state the facts established at the trial.¹

It is claimed by the plaintiffs that upon this evidence—which we have stated as facts only on the theory of a demurrer to evidence—two contracts are established—namely, first, a contract made by the defendant directly with the plaintiffs to retain and pay over to them the compensation for which they stipulated with the State; and, second, a contract made by the defendant in terms with the State, but for the benefit of the plaintiffs; and that the first of these is set up in the special count, but that a recovery may be had upon either of them under the common count alone, on the ground that both have been completely executed on the part of the plaintiffs.

The theory of the first of these contracts, insisted upon by the plaintiffs, is, that the evidence has established the following

¹ The discussion of the evidence has been omitted.—ED.

facts : First, an actual promise, made by the defendant some time in the year 1875, that he would retain and pay over to the plaintiffs the compensation for which they had stipulated with the State ; second, that the services rendered by the plaintiffs in the proceeding against Chiles were the consideration by which this promise was supported, and that these services were a sufficient consideration, because they constituted a benefit conferred by the plaintiffs on the defendant at the defendant's request ;¹ and third, that the promise was made with the consent of the State of Texas, to which the moneys so to be held and paid over belonged.

It is next insisted that the services rendered by the plaintiffs in the proceeding against Chiles constituted a benefit conferred by the plaintiffs upon defendant at his request, and, therefore, furnished a consideration which supports the subsequent promise.

A somewhat curious and important question here presents itself, which does not appear to have been well settled yet. If these services were in fact the very services which the plaintiffs were already bound to perform by virtue of a subsisting contract with the State of Texas, were they capable of serving as the consideration for any promise by the defendant, notwithstanding they might result, and did result, in a benefit to him ? We have examined several cases bearing upon this question.²

Mr. Frederick Pollock, in his treatise on the Principles of Contract (p. 163), seems to suppose that this case³ involved a new promise by the plaintiff, and not merely the *act* of delivering on the strength of defendant's promise. He says : " In the case where the party is already bound to do the same thing, but only by contract with a third person, there is some difference of opinion. But there seems to be no valid reason why the *promise* should not be good in itself, and therefore a good

¹ Only so much of the opinion is given as relates to this question.—ED.

² The citation of cases has been omitted.—ED.

³ *Scotson v. Pegg*, *supra*, p. 475.

In the case where the party is already bound to do the same thing, but only by contract with a third person, there is some difference of opinion. The new promise purports to create a new and distinct right, which, if really created, must always be of some value in law, and may be of appreciable value in fact. . . .

The reasoning of these cases (*Shadwell v. Shadwell* ; *Scotson v. Pegg*) assumes that a promise to A. to perform an existing duty to B. is itself enforceable by A., which is not clear on principle, and has not been directly decided. Perhaps the best explanation is that the promise to perform an existing contract with B. is to be read as being or including a promise not to exercise the right of rescinding it with B.'s consent.—Pollock on Contracts (4th ed.), 178–179.—ED.

consideration. *It creates a new and distinct right*, which must be always of some value in law, and may be of appreciable value in fact. There are many ways in which B. may be very much interested in A.'s performing his contract with C., but yet so that the circumstances which give him an interest in fact do not give him any interest which he can assert at law. It may well be worth his while to give something for being enabled *to insist in his own right* on the thing being done. This opinion has been expressed and acted on in the Court of Exchequer (Scotson v. Pegg), and seems implied in the judgment of the majority of the Court of Common Pleas some weeks earlier."

The rule established by these authorities is, that a promise made in consideration of the doing of an act which the promisee is already under obligation to a third party to do, though made as an inducement to secure the doing of that act, is not binding because it is not supported by a valuable consideration. We conceive this to be clearly true when the act done on the part of the promisee involves nothing more than *performance of the original obligation toward the party to whom it was due*. On the other hand, if the promise be made in consideration of a *promise* to do that act, entered into directly with the promisor, as indicated by Mr. Pollock, or in consideration that some dispute is thereby determined, or that some right is waived, as suggested by the remarks of Martin, B., in Scotson v. Pegg, then the promise is binding, because not made in consideration of the performance of a subsisting obligation to another person, but upon a new consideration moving between the promisor and promisee. We do not perceive that Shadwell v. Shadwell or Scotson v. Pegg are opposed to this view; though some observations were thrown out by the learned judges during the argument which we cannot reconcile with it, and which we cannot assent to.

We think that the consideration on which this defendant's promise to the plaintiffs is alleged to have been founded is governed by the rule which we have stated. It is claimed that the services rendered by the plaintiffs in the proceeding against Chiles, in the Supreme Court of the United States, were rendered at the request of the defendant, and constituted the consideration for his subsequent promise.

But it appears that, at the time when they are said to have carried on these proceedings at his request, they had already been retained by and were under a legal obligation to the State of Texas to perform these services; and it is not shown that they promised the defendant that they would continue them, or that they were induced by defendant's request to determine any

dispute as to their obligations, or to waive any claim. In a word, no other consideration for any promise by the defendant, than the performance of what they were legally bound to perform by a subsisting contract with another party, is shown; and the plaintiffs have shown, on the other hand, in their own behalf, that they actually did perform that act under their prior contract. We hold that these services could not serve as a consideration for any promise by the defendant, even if it had been made at the time of the request for their performance. It may be added that, even if they could serve this purpose, they are not shown by any evidence to have been, *as a matter of fact*, the consideration on which the promise here insisted on was based. What the consideration for a promise was is a matter of evidence, and this consideration is not shown to have been referred to, or to have been in the minds of the parties. We know of no principle which would have authorized a jury to assume, in the absence of affirmative proof, that some past benefit, conferred at a party's request, was intended to serve as a reason or consideration of a subsequent promise, whose terms in no way referred to it, merely because it was an event which had once happened between the same parties. The antecedents of parties are not to be sifted for a consideration.

Again, it should appear in some way that these services were, *in fact*, rendered in consequence of defendant's request. If the plaintiffs were already bound by their contract with another party to perform them, and were actually performing them at the time of defendant's request; in other words, if they were already moved by a sufficient legal cause, the mere fact of a request by a new party is not evidence that they were caused by that request; and this record discloses no other affirmative evidence tending to show that the plaintiffs did, in fact, act upon that request. Indeed, by showing, in their own behalf, that they obtained judgment against Chiles under their contract with the State of Texas (Rec. 15), they have shown that they did not act upon defendant's request.

Judgment is accordingly affirmed.

LEWIS F. F. ABBOTT v. VALENTINE DOANE, JR.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS,
APRIL 6, 1895.

[*Reported in 163 Massachusetts Reports 433.*]

CONTRACT upon a promissory note for \$500, dated December 27th, 1892, payable in three months after date to the order of the plaintiff, and signed by the defendant. The answer set up want of consideration. At the trial in the Superior Court, before Bond, J., the jury returned a verdict for the plaintiff, and the defendant alleged exceptions. The facts appear in the opinion.

W. B. French for the defendant.

H. L. Parker, Jr., for the plaintiff.

ALLEN, J. The plaintiff had given his accommodation note to a corporation, which had had it discounted at a bank, and left it unpaid at its maturity. The defendant, being a stockholder, director, and creditor of the corporation, wishing to have the note paid at once for his own advantage, entered into an agreement with the plaintiff whereby he was to give to the plaintiff his own note for the amount, and the plaintiff was to furnish money to enable the defendant to take up the note at the bank. This agreement was carried out, and the defendant now contends that his note to the plaintiff was without consideration, because the plaintiff was already bound in law to take up the note at the bank.

It is possible that, for one reason or another, both the bank and the plaintiff may have been willing to wait a while, but that the defendant's interests were imperilled by a delay, and indeed required that the note should be paid at once, and that the corporation, whose duty it was primarily to pay it, was without present means to do so. Since the defendant was sane, *sui juris*, was not imposed upon nor under duress, knew what he was about, and probably acted for his own advantage, it would certainly be unfortunate if the rules of law required us to hold his note invalid for want of a sufficient consideration, when he has had all the benefit that he expected to get from it.

In this Commonwealth it was long ago decided that, even between the original parties to a building contract, if after having done a part of the work the builder refused to proceed, but afterward, on being promised more pay by the owner, went on and finished the building, he might recover the whole sum so promised.

But when one who is unwilling or hesitating to go on and perform a contract which proves a hard one for him is requested

to do so by a third person who is interested in such performance, though having no legal way of compelling it, or of recovering damages for a breach, and who accordingly makes an independent promise to pay a sum of money for such performance, the reasons for holding him bound to such payment are stronger than where an additional sum is promised by the party to the original contract.

Take an illustration. A. enters into a contract with B. to do something. It may be to pay money, to render service, or to sell land or goods for a price. The contract may be not especially for the benefit of B., but rather for the benefit of others ; as, *e.g.*, to erect a monument, an archway, a memorial of some kind, or to paint a picture to be placed where it can be seen by the public. The consideration moving from B. may be executed or executory ; it may be money, or anything else in law deemed valuable ; it may be of slight value as compared with what A. has contracted to do. Now A. is legally bound only to B., and if he breaks his contract nobody but B. can recover damages, and those damages may be slight. They may even be already liquidated at a small sum by the terms of the contract itself. Though A. is legally bound, the motive to perform the contract may be slight. If after A. has refused to go on with his undertaking, or while he is hesitating whether to perform it or submit to such damages as B. may be entitled to recover, other persons interested in having the contract performed intervene, and enter into a new agreement with A., by which A. agrees to do that which he was already bound by his contract with B. to do, and they agree jointly or severally to pay him a certain sum of money, and give their note or notes therefor, and A. accordingly does what he had before agreed to do, but what perhaps he might not otherwise have done, no good reason is perceived why they should not be held to fulfil their promise. They have got what they bargained for, and A. has done what otherwise he might not have done, and what they could not have compelled him to do.

Without dwelling further on the reasons for the doctrine, it seems to us better to hold, as a general rule, that if A. has refused or hesitated to perform an agreement with B., and is requested to do so by C., who will derive a benefit from such performance, and who promises to pay him a certain sum therefor, and A. thereupon undertakes to do it, the performance by A. of his agreement in consequence of such request and promise by C. is a good consideration to support C.'s promise.¹

Exceptions overruled.

¹ The citation of authorities has been omitted.—ED.

L. F. W. AREND, RESPONDENT, v. CHRISTOPHER SMITH,
APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, JANUARY 19, 1897.

[*Reported in 151 New York Reports 502.*]

APPEAL from a judgment of the General Term of the Supreme Court in the fifth judicial department, entered November 26th, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the Court.

The nature of the action and the facts, so far as material, are stated in the opinion.

Stephen Lockwood for appellant.

Mason & Kellogg for respondent.

VANN, J. On February 17th, 1893, the plaintiff was president of a railroad corporation to which the defendant was indebted in the sum of \$1000, then past due, upon a subscription for stock issued to him by the company. The plaintiff, as president, demanded payment of the sum subscribed, and threatened suit by the company in case it was not paid, as he had on one occasion about a month before. The defendant said that he had plenty of property, but owing to the hard times he had no money, and could not then pay the debt. The plaintiff asked him for his note, and said that he could get it discounted, and the defendant replied that when the note fell due he would not be able to pay it. The plaintiff then said that when the note became due he would "renew it and renew it again," if the defendant so desired. The defendant thereupon made his promissory note for \$500 at three months and delivered it to the plaintiff, who at once endorsed it, procured it to be discounted at a bank, and paid the proceeds over to the railroad company to apply upon the debt of the defendant, who himself paid the sum charged by the bank for discounting the note. The plaintiff had no pecuniary interest in the debt or the note, except as an endorser for the accommodation of the defendant. On May 22d, 1893, when the note became due, the defendant could not pay it, and so informed the plaintiff, who told him to make out a new note, and added that he had better make it for \$1000, so as to pay the balance of the subscription, and that he, the plaintiff, would get it discounted. The new note was accordingly made for that amount and delivered to the plaintiff by the defendant, who promised to pay the sum charged as discount as soon as it could be ascertained. Owing to stringency in the money market, the banks refused to discount the note, and the

plaintiff notified the defendant that he must take care of the first note, but he omitted to do so. On June 6th the second note was returned to the defendant, who accepted it, and has retained it ever since. The plaintiff was compelled to pay the bank the amount of the first note, which was thereupon delivered to him, and this action was brought to recover the sum so paid from the defendant. The answer sets up as a defence the agreement to renew and the violation thereof by the plaintiff, and the only question presented for decision is whether that agreement was supported by a sufficient consideration.

When the agreement in question was made the defendant owed the plaintiff nothing, but he owed the railroad company \$1000 that was then due. He was under a lawful obligation to pay that debt, and the giving of a note to raise money for that purpose was an advantage to him only, as it extended the time of payment. As he did no more than his duty, no consideration could arise from the act. The payment of a valid and admitted debt by the one who owes it is no foundation for a promise, even by the creditor, let alone a stranger to the original consideration. The defendant parted with nothing that the law recognizes as of value, and suffered nothing that the law recognizes as an injury. He virtually borrowed the credit of the plaintiff to pay a precedent debt that he owed to a third party. When the note was delivered to the plaintiff he had no title to it, but simply held it as the agent of the defendant, for the purpose of procuring it to be discounted for his benefit. While he requested payment of the debt, it was only as president that he did so, and in that capacity he had the right to demand it. As the defendant did not have the money the plaintiff requested him to give a note, not for his own advantage, but in order to raise money for the accommodation of the defendant himself. Under these circumstances the promise of the plaintiff was a naked engagement that involved no legal obligation, but rested wholly upon the integrity and good faith of the one who made it, with no power in the courts to compel performance or to award damages for non-performance. As was well observed by one who wrote almost the first work upon the common law that is now extant, "A nude or naked promise is where a man promiseth another to give him certain money such a day, or to build a house, or to do him such certain service, and nothing is assigned for the money or for the building, or for the service. These be called naked promises, because there is nothing assigned why they should be made, and no action lieth in these cases, though they be not performed." (Doctor and Student, Dial. 2, ch. 24.) Although the promise in this case was made

to induce performance, as the act performed was less than the legal duty already resting upon the defendant, it was incapable of sustaining an action or maintaining a defence. While the plaintiff was doubtless interested in the corporation, and thus indirectly interested in the debt owing it by the defendant, still he owned no part of that debt, for it belonged wholly to the railroad company. Even if he had owned it all, however, his promise would, notwithstanding, have been without consideration, for, at the most, he simply induced the defendant to do indirectly what the law required him to do directly, and that was to pay his own debt. No consideration can arise simply from the method of doing an act which it is one's duty to do. The subject does not admit of extended discussion, for it has been a principle of the common law from the earliest times that a promise without a legal consideration as an equivalent cannot be enforced, and it is well settled that "the performance of an act which the party is under a legal obligation to perform cannot constitute a consideration for a new contract." (Robinson v. Jewett, 116 N. Y. 40.)

The judgment should be affirmed, with costs.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

(e) *Performance of, or promise to perform a non-contract obligation.*

ATKINSON v. SETTREE.

IN THE COMMON PLEAS, MAY 7, 1744.

[Reported in Willes 482.]

THIS was a special action on the case. The first count stated that on December 11th, in the sixteenth year, etc., at Westminster, and within the jurisdiction of the Court of our Lord the King of his palace of Westminster, the plaintiff, in order to procure the payment of the sum of £7 18s. which Catherine Grimaldi then owed him, by a certain writ dated December 10th in the same year duly issued out of the Court of Record of our said Lord the King of his palace of Westminster at the plaintiff's request, and directed to the bearers of the virge of the household, etc., officers and ministers of the said Court, commanding them to take the said Catherine by her body if she should be found within the jurisdiction of that Court, and have her at the then next Court to be holden on Friday, Decem-

ber 17th, then next to answer, etc., and procured the said Catherine to be arrested, etc., and to be there kept and detained in prison, etc.; that afterward, on the said December 11th, in consideration that the plaintiff at the request of the defendant undertook to release and discharge the said Catherine from her said imprisonment, the defendant promised to pay the plaintiff £7 18s., and also the costs and charges by the plaintiff expended in that suit, with an averment that those costs amounted to 15s. 4d., and that the plaintiff at the defendant's request discharged the said Catherine from her said imprisonment. There was a second count in the declaration which, though it varied from the first in several particulars, was equally open to the objection afterward made to the first. There was also a third count for money had and received.

The defendant pleaded the general issue, and at the trial the plaintiff obtained a verdict on all the counts, with £8 13s. 4d. damages.

A motion was made in Michaelmas Term, 1743, in arrest of judgment, which was opposed this day by Prime and Wynne and supported by Skinner and Draper, and at a subsequent time the rule was discharged.¹

¹ The grounds of the judgment do not appear in Lord Chief Justice Willes's books, but the following account is taken from Mr. J. Abney's manuscript: "*Skinner and Draper* moved in arrest of judgment. First, it does not appear that any plaint was levied, and without that a *capias* ought not to issue. Secondly, it does not appear that the cause of action in the Court below arose within the jurisdiction, and then the arrest was illegal, and there was no good consideration to support the promise. 1 Rol. Abr. 809; 2 Mod. 30, 197; 3 Lev. 23; 1 Saund. 74; 2 Ld. Raym. 1310. This is a void arrest, and therefore the discharge is no consideration. Godb. 358.

"*Prime and Wynne*, for the plaintiffs, insisted that to support this action in the superior court it was immaterial whether or not there were a cause of action in the inferior court, or whether or not the Court below had a jurisdiction. The declaration sets out the writ duly issued, commanding the bearer of the virge to arrest the party if found within the jurisdiction, and there to detain her. Salk. 202, 2. And the case of *Peacock v. Roll* in 1 Saund. 74 relates only to cases determined in the inferior court and brought up by error. The case of *Randal v. Harvey* is better reported in Palm. 394 than in Godb. 358. If the plaintiff's consent were necessary to release Grimaldi, and the officer could not discharge her without, then there is a good consideration to support the promise. They argued that it was not necessary that the arrest and detainer should be legal in order to make a good consideration, and for that purpose they cited 1 Rol. Abr. 12, pl. 12; 1 Rol. Abr. 19, pl. 6; Hob. 216; Sir T. Raym. 204; 1 Rol. Abr. 27, pl. 47; Sty. 249. Besides this is after a verdict, it having been proved to the satisfaction of Abney, J., who tried the cause, that the arrest and promise were within the jurisdiction of the Palace Court. 1 Sid. 30. If a judgment be irregular or erroneous, to forbear to sue out execution is a good considera-

HERRING v. DORELL.

IN THE QUEEN'S BENCH, TRINITY TERM, 1840.

[Reported in 8 Dowling 604.]

R. V. RICHARDS showed cause against a rule *nisi*, obtained by V. Williams for arrest of judgment or a new trial in this case. The case had been tried before the sheriff of Brecon, and a verdict found in favor of the plaintiff for £2 10s. 1d. The ground of seeking to arrest the judgment was, that no sufficient consideration for the promise by the defendant was disclosed on the face of the declaration. The substance of the declaration was that a person named Watkins and a person named Voss were joint debtors to the plaintiff. The plaintiff proceeded against them, and ultimately took Watkins and Voss in execution. An arrangement was made between Watkins and the plaintiff, and accordingly the former was discharged out of custody. Voss remained in custody, and in consideration of the discharge of Voss, the declaration alleged that the defendant undertook to pay the sum of £2 10s. 1d. due from Voss to the plaintiff, and Voss was accordingly discharged. It was contended, in support of the rule, that the plaintiff having discharged Watkins, who was jointly liable with Voss, that had the effect of entitling Voss to his discharge. Richards submitted that even after the discharge of Watkins, some step being necessary, in order to obtain the discharge of Voss, some portion of his imprisonment, until that step could be taken, must be considered as lawful. Suppose the prisoners had been confined in two different jails, one in Cornwall and the other in Northumberland, and one of them was discharged in Cornwall, some time must be allowed in order to discharge the other defendant from the jail in Northumberland. The detention of

tion to support an *assumpsit*, 2 Rol. Rep. 495; Yelv. 25; 1 Ventr. 120; 2 Lev. 3; 1 Lev. 257; 1 Sid. 392; Sir T. Raym. 211; Poph. 183; 1 Sid. 89; 1 Saund. 229; and 2 Ld. Raym. 795.

"The Court inclined to think that if the party were under an illegal arrest or imprisonment the promise was not good, but the question was whether as this was after a verdict it did not now sufficiently appear that the writ duly issued below,* and consequently that the suit arose within the jurisdiction; and that this case greatly differed from writs of error on judgments in the inferior court where nothing shall be intended. But they ordered it to be spoken to again, and afterward the plaintiff had judgment."—M. S. Abney, J.

* It was expressly stated in the declaration that the writ duly issued, etc.

the second defendant until his discharge must be considered as lawful. The smallest consideration was sufficient to support the promise alleged in the declaration, and here was some consideration for that purpose. If the proceeding could be considered as a nullity, then the plaintiff would be liable to an action of trespass, but in *Crozer v. Pilling*,¹ it appeared that an action on the case was the proper remedy, and not an action of trespass. There it was held that a plaintiff is bound to accept from a defendant in custody under a *ca. sa.* the debt and costs when tendered in satisfaction of his debt, and to sign an authority to the sheriff to discharge the defendant out of custody ; and that an action on the case will lie against the plaintiff, for maliciously refusing so to do. The case of *Smith v. Eggington*² was an authority to the same effect. The imprisonment was legal in its commencement, and, therefore, the sheriff could not be liable as a trespasser. It was not, therefore, a void imprisonment. The case of *Atkinson v. Bayntun*³ was an authority to show that sufficient consideration was disclosed on the face of this declaration to support the defendant's promise. The marginal note was, "M. being in custody on execution, pursuant to a warrant of attorney, by which he had agreed that execution should issue from time to time for certain instalments of a mortgage debt, defendant, in consideration that plaintiff would discharge M. out of custody, undertook that he should, if necessary, be forthcoming for a second execution. Held that defendant's was a valid contract." He cited *Sturlyn v. Albany*⁴ and *Pullin v. Stokes*.⁵ There A. having recovered judgment against B., and a *fi. fa.* being delivered to the sheriff in consideration of A. at the special request of C., had requested the sheriff not to execute the writ, C. promised to pay A. the debt and costs together with the sheriff's poundage, bailiff's fees, and other charges. On a judgment by default and error brought, the promise was holden to be binding on C., though it was not averred that the sheriff did in fact desist from the execution, nor what the amount of the poundage, etc., was, nor that the defendant had notice of such amount. In the present case Voss was not taken in execution after the discharge of Watkins, but both were legally in custody at the time of Watkins's discharge. The detention of one prisoner in such a case could not be considered as a trespass. But suppose it should be said that the plaintiff was bound to take steps to discharge Voss. If he was, he was entitled to a reasonable time for that purpose. During the time that elapsed before his actual discharge he was in legal

¹ 4 B. & C. 26 ; 6 Dowl. & Ry. 129.² *Ante*, Vol. VI., p. 33.³ 1 Scott, 404 ; 1 B. N. C. 444.⁴ Cro. Eliz. 67.⁵ 2 H. Bl. 312

custody. That custody furnished a sufficient consideration to support the defendant's promise.

V. Williams in support of the rule. This was an action on a promise alleged to have been made by the defendant to pay a certain debt due from Voss, who was in custody, if the plaintiff would release him. The joint debt of the two had, in point of law, been satisfied, by taking the defendants, Watkins and Voss, in execution and discharging Watkins out of custody. It was, therefore, no consideration for the plaintiff to consent to the discharge of Voss out of custody, since it was that to which he was absolutely entitled. Here was an execution against two joint debtors. They were both taken in execution. The plaintiff consented to the discharge of one of them. The authorities showed that the legal operation of the discharge of one of two joint debtors was the discharge of the debt. The imprisonment of the latter debtor, therefore, was clearly illegal. He cited *Clarke v. Clement*,¹ *Nadin v. Battie*,² *Good v. Wilks*,³ *Basset v. Salter*.⁴ In the last case even an escape with the consent of the plaintiff was held to be sufficient to prevent him from ever taking the defendant in execution for the same matter. The discharge of Watkins operated as if there had been actual payment of the debt. If so, then it must be contended, on the other side, that if the whole debt had been paid, that would afford a good consideration for such a promise. In the case of *Crozer v. Pilling* it was held that an action on the case would lie for detention of the defendant, after a tender of the debt and costs, in consequence of the plaintiff not signing a discharge. With respect to the sufficiency of the consideration in the present case, *Atkinson v. Settree*⁵ was an authority to show that the consideration here was insufficient. There it was held that if A. be illegally arrested by B. for a debt, a promise by C. to pay the debt claimed by B. in consideration of B.'s releasing A. out of custody is void. He cited *Stilk v. Myrick*,⁶ *Harris v. Watson*.⁷

COLERIDGE, J. The question in this case, whether this was a good consideration or not, depends upon the situation of Voss at the time of his discharge. Both he and Watkins had been taken under a joint execution. Watkins made certain terms with the plaintiff, and the latter voluntarily discharged him. No terms were made as to the situation of Voss, his rights were, therefore, to be considered according to the situation in which the law had placed him. Suppose Watkins alone had been in custody, it is clear that the voluntary discharge of him would have been a discharge of the debt, and no other proceedings

¹ 6 T. R. 525.

² 5 East, 147.

³ 6 Mau. & S. 413.

⁴ 2 Mod. 136.

⁵ Willes, 482.

⁶ 2 Campb. 317.

⁷ Peake's Ca. 726.

could have been taken to recover it. It seems to me in the same way that the discharge of Watkins operated to release Voss, his co-debtor. I think, therefore, both on principle and authority that this rule ought to be made absolute.

Rule absolute.

SMITH AND ANOTHER v. MONTEITH.

IN THE EXCHEQUER, NOVEMBER 18, 20, 1844.

[*Reported in 13 Meeson & Welsby 426.*]

ASSUMPSIT. The declaration stated that, before and at the time of the making of the promise of the defendant thereafter next mentioned, an action had been commenced and was depending by and at the suit of the plaintiffs against one Charles J. Dunlop, in the Court of our Lady the Queen before the Barons of her Exchequer at Westminster, for the recovery of a certain sum of money, to wit, the sum of £83 6s. 11d.; that the said C. J. Dunlop, after the commencement of the said action, and while the same was so depending, and before the making of the said promise of the defendant, was about to leave England and proceed to parts beyond the seas, to wit, to Halifax, in North America, and the said C. J. Dunlop had been arrested, and was then in the custody of the Sheriff of Lancashire, at the suit of the said plaintiffs, under and by virtue of a writ of our Lady the Queen, called a *capias*, duly issued in the said action by the plaintiffs against the said C. J. Dunlop, according to the statute in that case made and provided, out of the said Court of our Lady the Queen before the Barons of the Exchequer at Westminster, and directed to the Chancellor of the county palatine of Lancaster, or his deputy there, and of a certain mandate duly issued by the said Chancellor on the said writ of *capias*, and directed to the said Sheriff of Lancashire, and which said writ of *capias* and mandate respectively, in pursuance of an order of the Hon. Sir John Gurney, knight, one of the Barons of her Majesty's said Court of Exchequer at Westminster, bearing date, to wit, on April 15th, 1844, were and each of them was duly marked and endorsed for bail for the sum of £69; and whereas costs and charges to a certain amount, to wit, to the amount of £20, at the time of the making of the said promise of the defendant, had been incurred by the plaintiffs in and about the prosecution of the said action, and the arrest of the said C. J. Dunlop; and thereupon theretofore, to wit, on

April 19th, 1844, in consideration that the plaintiffs, at the request of the defendant, would discharge the said C. J. Dunlop out of the custody of the said Sheriff of Lancashire as to the said action, the defendant undertook and promised the plaintiffs to pay to them the sum of £88, for the debt, interest, costs, and charges of the plaintiffs in the said action brought by the plaintiffs against the said C. J. Dunlop when he, the defendant, should be thereunto afterward requested. The declaration then averred that the plaintiffs, confiding in the said promise of the defendant, did then discharge the said C. J. Dunlop out of the custody of the said sheriff as to the said action, whereof the defendant afterward, to wit, on the day and year last aforesaid, had notice, and was then requested by the plaintiffs to pay to them the said sum of £88, for the debt, interest, costs, and charges aforesaid; yet the defendant has disregarded his said promise and undertaking in this, to wit, that he did not then, or at any other time, pay to the said plaintiffs the said sum of £88, or any part thereof, and the said sum of £88 remains wholly due and unpaid to the plaintiffs.

Plea, that the said C. J. Dunlop was sued, arrested, and detained in custody, as in the declaration mentioned, and until the discharge from custody therein mentioned, by the procurement of the plaintiffs, and not otherwise; and the defendant further says, that there was not, at the time of commencing the said action against the said C. J. Dunlop, nor during the time of the prosecution thereof, or any part of the said time, nor at the time of arresting the said C. J. Dunlop, nor during any part of the time in which he was detained in custody, as in the declaration mentioned, nor at the time of the making of the undertaking and promise by the defendant, as in the declaration mentioned, *any claim or demand or cause of action*, against the said C. J. Dunlop, in respect whereof the plaintiffs could or were entitled to recover in the said action against the said C. J. Dunlop the said sum which the defendant so promised to pay, or any other sum or sums, matter or thing; and the plaintiffs did not, by discharging the said C. J. Dunlop from custody, as in the said first count mentioned, give up or part with any available remedy against the said C. J. Dunlop, as the plaintiffs, at the time of commencing and prosecuting the said action against the said C. J. Dunlop, and at the time of procuring his arrest, and of his being arrested and detained in custody, and at the time of the said undertaking and promise of the defendant in the declaration mentioned, well knew; but which the defendant, at the time of making the said undertaking and promise, did not know; and the defendant says, that the said writ in the

declaration mentioned, and the said arrest and detaining in custody, and proceedings in the said action in the said declaration mentioned, were on the part of the plaintiffs colorable only, and the same were not procured, commenced, or prosecuted by the plaintiffs for the purpose or with the intent of trying any doubtful or contested question of law or fact. Verification.

Special demurrer, assigning for causes, among others, that the plea does not in any manner answer the declaration ; that it neither traverses any allegation therein, nor confesses and avoids the cause of action therein stated ; that the contract of the defendant stated in the declaration is an original contract, founded on a new consideration, altogether distinct and different from the cause of action against the said C. J. Dunlop, such consideration for the defendant's promise being an act done by the plaintiffs for the benefit of the said C. J. Dunlop, at the request of the defendant, and such benefit to the said C. J. Dunlop being precisely the same whether the plaintiffs had or had not any cause of action against him ; and therefore the question, whether the plaintiffs had any cause of action against the said C. J. Dunlop is in this action wholly immaterial.

The plaintiffs' points marked for argument were that the plea is bad in substance, and is no answer to the declaration. The consideration alleged is the discharge of Dunlop out of custody of the sheriff at the request of the defendant, which discharge was a benefit to Dunlop, which he could not have obtained without the act of the plaintiffs in giving the discharge to the sheriff, whether the plaintiffs could have proved their debt against Dunlop or not, and which discharge materially altered the situation of the plaintiffs by allowing Dunlop to leave the kingdom. And therefore the question as to whether there was another and what distinct consideration, not alleged in the declaration, is in this action immaterial. The plaintiffs will also contend that the plea, if it amounts to anything, is an argumentative denial of there being any consideration for the promise of the defendant, and is therefore bad as amounting to the general issue. Also that, supposing the want of consideration for the promise may be specially pleaded, the plea is bad, because it negatives one particular species of consideration only—namely, that of damage to the plaintiffs, whereas damage to the plaintiffs is not alleged in the declaration ; and it is quite consistent with the plea that there was a good consideration for the promise, either by benefit to Dunlop at the request of the defendant, which in fact there was, or benefit to the defendant himself. Also that the plea, consisting of matter in denial only, ought not to have concluded with a verification. Also that the

plea is double in alleging that there was no debt due from Dunlop, and that the arrest was colorable only, such defences being separate and distinct, which cannot both be put in issue without rendering the replication double. And, lastly, that the plea contains no matter upon which any material issue can be taken.*

The defendant's points were that the declaration is insufficient and bad ; that it does not disclose any sufficient consideration to support the action ; that it is not alleged therein that there was a good cause of action or a doubtful claim on which the action mentioned in the declaration was founded, or that the plaintiffs had any right to continue Dunlop in custody ; and that it is not shown that the plaintiffs sustained any damage by his discharge from custody.

Crompton in support of the demurrer.

Peacock, contra.

Crompton in reply.

POLLOCK, C.B. I am of opinion that the plaintiffs are entitled to the judgment of the Court. This is an action against the defendant, founded on a promise by him to pay a sum of money, in consideration of the discharge out of custody of a defendant in a former action, who had been arrested at the suit of the plaintiffs. For aught that appears that arrest was legal, and the party was in lawful custody ; this is not, therefore, a case of *duress* ; neither can it be put as a case of *fraud*, for there is no sufficient allegation of fraud in any part of the plea. The substance of the plea is that there was not any claim or demand or cause of action, in respect of which the plaintiffs were entitled to sue the defendant in the former action ; but there is no averment that the plaintiffs were aware of that ; and for anything that is stated in the plea, the original inception of that action was perfectly *bond fide*, although the plaintiffs may have been mistaken as to their remedy or the form of proceedings adopted by them. The plea goes on to state, that the plaintiffs did not, by discharging Dunlop, give up or part with any available remedy against him. The words "available remedy" are rather loose and vague ; they may mean several things ; they would be satisfied by the fact of Dunlop being a mere pauper, for it is not stated that the plaintiffs had no legal right or remedy which they gave up, but merely that they had no *available* remedy. So also those words would be satisfied if there were some latent defect which might appear in pleading or come out in evidence ; yet the action might be honestly commenced, and the claim founded in justice ; and it cannot be said that, because the proceedings were open to such latent de-

fect, the defendant's promise would not be founded on a good consideration. And this is the only part of the plea as to which there is any averment of the plaintiff's *knowledge*. It then goes on to say that the action against Dunlop was not brought for the purpose of trying any doubtful or contested right. It seems to me that the declaration in its form calls for an answer, and that this plea is no sufficient answer. I agree with the general scope of Mr. Peacock's argument. If a party does an illegal act, or if he abuses the process of the Court to make it the instrument of oppression or extortion, that is a fraud on the law ; and if the original arrest, or the continuance of that arrest, were of that character, and were shown to be so by proper averments in the plea, that would very probably constitute a good defence to an action like the present. But this plea falls far short of that, the arrest being legal, and there being no averment of knowledge on the part of the plaintiffs except that they knew they did not part with any available remedy by discharging Dunlop out of custody. It does not, therefore, contain a sufficient statement in fact to bring it within the scope of Mr. Peacock's argument or the cases cited by him. The judgment must therefore be for the plaintiffs.

PARKE, B. I am also of opinion that the plaintiffs are entitled to judgment. In the first place, I think that the declaration is sufficient on general demurrer. It states that an action had been brought and was depending at the suit of the plaintiffs against a person of the name of Dunlop, and that he had been arrested and was in custody on a *capias* duly issued in that action. On such a statement, it must be intended, *primâ facie*, that the action was well founded, and the writ regularly and properly issued. That doctrine is laid down in the case of *Bidwell v. Catton*, Hob. 216. That was an action of *assumpsit* on a promise by the defendant to pay £50 in consideration of the plaintiff's forbearing to prosecute a suit ; and after verdict it was objected in arrest of judgment, first, that it was not alleged that the plaintiff had any just cause of action, and, secondly, that the action still remained. But the Court nevertheless gave judgment ; " for, first, suits are not presumed causeless, and the promise argues cause, in that he desired to stay off the suit ; secondly, though this did not require a *discharge* of the action, yet it requires a loss of the writ and a *delay* of the suit, which was both benefit to the one and loss to the other." Therefore I think, *primâ facie*, this declaration is sufficient, the former action being presumed to be for cause, and the *capias* being presumed to have been properly issued. There is another case which I may advert to, to the same effect, of *Pooley v.*

Lady Gilberd, 2 Bulstr. 41. There it is stated that "the plaintiff had preferred a bill in Chancery against the defendant for marriage-money by her received. The defendant upon this, in consideration that the plaintiff would stay the suit there by him commenced, did assume to pay him £100, and also to deliver up a bond of £40 which she had. Upon this promise the plaintiff made stay of his suit, but the defendant not performing the promise, upon this the action was brought, and a verdict found for the plaintiff. It was moved for the defendant, in arrest of judgment, that the declaration was not good, for that there was no good ground to raise the promise, there being no sufficient consideration for the same, for it doth not appear in the declaration that the suit in Chancery was a lawful suit to be there determined, and so if the suit was not lawful, the consideration to forbear such a suit was no good consideration to raise a promise." But the Court say that "if the plaintiff had only a subpœna out of Chancery against the defendant, and did not make the cause thereof known to him—if he, in consideration that he would not prosecute any further against him, did assume to pay him so much, this clearly is a good consideration to raise a promise." Upon these authorities and upon principle this declaration is sufficient

Then the question is whether the plea, which must be construed most strongly against the defendant, discloses any answer. I agree with Mr. Crompton, that it is difficult to see upon what principle the plea is constructed. No doubt it shows a *prima facie* case of hardship and injustice upon the defendant in the former action, but the question is whether it discloses a legal defence to this action. It does not show that the arrest was *illegal*; and it certainly is not sufficient on the ground of *fraud*, because there is no averment of any false statement or misrepresentation of fact in order to procure the arrest; still less does it disclose any ground of *duress*, since all the averments show that the imprisonment was lawful. If it be good at all, it must be on the ground of want of consideration for the defendant's promise. Now it seems to me that the plea does not disclose sufficient matter to show a want of consideration. Taking it most strongly against the defendant, in substance it is no more than this, that the plaintiffs had no claim or cause of action which could have been enforced against Dunlop; but it does not allege that the plaintiffs knew that fact. It must be taken, therefore, that the *capias* on which Dunlop was arrested was regularly and duly obtained; and the plea does not show that the plaintiffs were guilty of any illegal conduct, that they acted illegally in making the arrest, or from malicious motives,

or that the arrest was without reasonable or probable cause. Dunlop, therefore, as it must be assumed, was in custody at the suit of the plaintiffs, under process which was legal and regular ; and that being so, the discharge from such an arrest is quite a sufficient consideration to support the promise laid in this declaration ; and I entirely agree that we cannot inquire into the quantum or *amount* of consideration. Upon the face of the plea, therefore, there was a legal arrest, and the discharge from that arrest, under which the payment of the debt might have been obtained, was a benefit to Dunlop, quite sufficient to found a consideration for a promise to pay that debt. For these reasons I am of opinion that the plea furnishes no sufficient answer to the declaration, and that our judgments must be for the plaintiffs.

GURNEY, B. I am of the same opinion. To make the plea a sufficient answer it ought to have shown, either that the plaintiffs acted illegally or fraudulently in making the arrest or that they practised some fraud on the defendant. It shows neither, and therefore is no sufficient answer.

Judgment for the plaintiffs.

WILLIAM H. TOLHURST ET AL., APPELLANTS, v.
JOSEPH A. POWERS, RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, JUNE 7, 1892.

[*Reported in 133 New York Reports 460.*]

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made July 11th, 1891, which affirmed a judgment in favor of defendant, entered upon the report of a referee.

This action was brought to recover a balance of an account originally due plaintiffs from one Clinton M. Ball for services in the construction and fitting of a dynamo and other electrical appliances, which it was claimed defendant had agreed to pay.

The facts, so far as material, are stated in the opinion.

Nelson Davenport for appellants.

Frank S. Black for respondent.

FINCH, J. We agree with the prevailing opinion of the General Term that there was no consideration to support the promise of Powers to pay Ball's debt to the plaintiffs. The latter originally constructed a dynamo, for which Ball became indebted to them, and after all payments he remained so indebted when

the machine was ready for delivery. The builders, of course, had a lien upon it for the unpaid balance, but waived and lost their lien by a delivery to Ball without payment. He, being then the owner and holding the title free from any incumbrance, sold the dynamo to Crane on a contract apparently contingent upon the successful working of the machine. It did not work successfully, and was sent back to plaintiffs to be altered with a view of correcting its imperfections. At this point occurred the first intervention of the defendant Powers. He had not then obtained, so far as the case shows, any interest in the machine, and the complete title was either in Crane or Ball or in both; but when the plaintiffs hesitated about entering upon the new work until their charges for it should be made secure, Powers agreed to pay them. The true character of that promise is immaterial, for when the work was done Powers did pay according to his contract. Thereafter Ball and Powers requiring a delivery of the dynamo, the plaintiffs undertook or threatened to retain the possession till the original debt should be paid. That they had no right to do. Their primary lien was lost by the delivery, and they acquired no new one by reason of the repairs which were paid for. Such refusal to surrender the possession was an absolute wrong without any color of right about it. After demand their refusal was a trespass, and according to their own evidence the sole consideration for the promise which they claim that Powers made to pay the old debt of Ball was their surrender of possession. To that they were already bound, and parted with nothing by the surrender. They gave up no right which they had against any one, but extorted the promise by a threat of what would have been, if executed, a wrongful conversion. Doing what they were already bound to do furnished no consideration for the promise.

It is said, however, that Ball made no demand, and until he did the plaintiffs were not bound to deliver the possession, and that the delivery was to Powers and not to Ball. But there was certainly a request to ship the machine, and so part with the possession, and both the request and the shipment were with the concurrence of Ball. It was that very request that brought up the subject of the old debt, and Ball stood by, plainly assenting, at least by omitting any dissent or objection. The shipment to Powers by name made it none the less a delivery to Ball, whose concurrence is explicitly found. Surely, after what happened, the latter could not have maintained an action for conversion on the ground that there had been no delivery to him. The undisputed fact is that the plaintiffs were seeking to withhold a delivery to the owner without the least right of re-

fusal. There was no harm to plaintiffs and no benefit conferred on Powers. The former parted with nothing of their own, and the latter gained nothing, for the shipment to him was a delivery to Ball, the owner, since made with his concurrence, and Powers obtained no right or interest in the property as the result of the delivery. He simply took it, if he took at all, which is doubtful, as the agent or bailee of the owner, and acquired no right in it until a later period. Until the mortgage made subsequently, his advances for repairs constituted only an unsecured debt against Ball. The turning-point of the appellant's argument is the unwarranted assumption that the plaintiffs agreed to deliver, and did deliver, the dynamo to one whom they knew not to be the owner without the assent of Ball, who was the owner, but who, nevertheless, stood by and made no objection. No fair construction of the evidence will sustain the appellant's theory.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

ENGLAND v. DAVIDSON.

IN THE QUEEN'S BENCH, MAY 5, 1840.

[*Reported in 11 Adolphus & Ellis 856.*]

ASSUMPSIT. The declaration stated that heretofore, to wit, etc., the defendant caused to be published a certain handbill, placard, or advertisement, headed "Fifty pounds reward;" whereby, after reciting that, late on the night of, etc., the mansion house of defendant, at, etc., was feloniously entered by three men, who effected their escape, that two men had been taken into custody on suspicion of having been concerned in the felony, and that a third, supposed to belong to the gang, had been traced to Carlisle, and was of the following description, etc., the defendant did promise and undertake that whoever would give such information as should lead to the conviction of the offender or offenders should receive the above reward; that plaintiff, confiding, etc., did afterward, to wit, on, etc., give such information as led to the conviction of one of the said offenders, to wit, one David Robson; and that afterward, to wit, at the assizes for Northumberland, David Robson, who was guilty of the said offence, to wit, the feloniously entering, etc., was in due course of law convicted of the said offence of

feloniously entering, etc., in consequence of such information so given by plaintiff ; of all which said several premises defendant afterward, to wit, on, etc., had notice, and was then requested by plaintiff to pay him the said sum of £50 ; and defendant afterward, to wit, on, etc., in consideration of the premises, then promised plaintiff to pay him the sum of £50 ; breach, that, although defendant, in part performance of his said promise and undertaking, to wit, on, etc., did pay to plaintiff the sum of £5 5s., in part payment of the said sum of £50, yet, etc. (breach, non-payment of the residue).

Third plea. That heretofore, and long before and at the time when the house of defendant was so feloniously entered, and continually from thence hitherto, plaintiff was, and now is, a constable and police officer of the district where the said house of defendant is situate and the said offence was committed ; and it then was the duty of plaintiff, as such constable and police officer, to have given, and to give, every information which might lead to the conviction of the said offender, and to apprehend him and prosecute him to conviction, if guilty, without any payment or reward to him made in that behalf ; that, by the said advertisement partly set out in the declaration, defendant gave notice and promised that whoever would give such information to plaintiff, therein described as police officer, Hexham, as should lead to the conviction of the offender or offenders, should receive the said reward in the said advertisement mentioned, and in no other manner whatever ; and that, by reason of the premises, the said promise was and is void in law. Verification.

Demurrer, assigning for causes that the plea amounts to the general issue, and does not deny, or confess and avoid, and is multifarious, and tenders an immaterial issue. Joinder.

Ingham now appeared for the plaintiff, but the Court called on *Martin* for the defendant.

DENMAN, C.J. I think there may be services which the constable is not bound to render, and which he may therefore make the ground of a contract. We should not hold a contract to be against the policy of the law, unless the grounds for so deciding were very clear.

LITTLEDALE, PATTESON, and COLERIDGE, JJ., concurred Judgment for the defendant.

GEORGE GILLMORE v. DANIEL LEWIS.

IN THE SUPREME COURT OF OHIO, DECEMBER TERM, 1843.

[Reported in 12 Ohio Reports 281.]

THIS was an action of *assumpsit* from the county of Fairfield.

The declaration in this case contains but a single special count, in which the plaintiff declares that, heretofore, to wit, etc., the defendant and one Brooke, not served with process, printed, published, and circulated a certain advertisement, that their store had been broken open, and about \$700 in money stolen therefrom ; and by the said handbill or advertisement, the said defendant and the said Brooke, under the name and style of Brooke & Lewis, did then and there promise, and undertake, to pay the sum of \$300 to any person or persons who would apprehend the aforesaid thief and money, or \$200 for the cash alone, and \$100 for the thief alone.

The plaintiff avers that afterward, to wit, etc., confiding in the said promises and undertakings, he sought out, and discovered that one James Nelson was the thief ; and to effect his arrest for the commission of the crime he applied to a justice of the peace, made oath to the fact, and obtained a warrant, which was delivered to the plaintiff, he being one of the acting constables of Walnut township in said county ; and the plaintiff afterward, by virtue of said warrant, arrested the said Nelson, who was duly convicted and the money restored to defendant and Brooke, of which premises the defendant and Brooke had notice, and thereby became liable, and promised, etc.

To this declaration the defendant demurred generally, and asks the judgment of the Court whether the case made entitles the plaintiff to judgment.

H. H. Hunter and *H. Stanbery* in support of the demurrer.

John T. Brazee & *T. Ewing* for plaintiff, *contra*.

WOOD, J. No doubt is entertained by us, as a general rule, that the detection, arrest, and conviction of a felon, or the discovery and seizure, or return of stolen property, is a good consideration to sustain a promise made on such condition. When the condition is complied with, he who performs it becomes the promisee ; the contract is then complete and executed on his part ; the legal interest is vested in him, and he has the right to claim the reward as the benefit of his exertion.

So long as the administration of criminal justice is necessary to secure the peace and safety of society, such contracts should

be regarded with a favorable eye. They often stimulate to exertion where civil duty is insufficient in obligation to ferret out crime, hunt down the offender, and bring him to public justice. As a civil duty, every individual is bound to use reasonable exertion to effect the punishment of crime ; but the law imposes no such obligation on the private citizen, unless called upon for assistance by its ministerial officers ; and an offered reward is frequently the only hope of remuneration for a meritorious service rendered to the commonwealth.

But public officers, on whom the law casts this duty, from whom it requires exertion, and to whom it affords adequate compensation, occupy different ground.

It is an indictable offence in them to exact and receive anything but what the law allows for the performance of their legal duties. A promise to pay them extra compensation is absolutely void under the statute of Ohio. Such promise could not be enforced at common law, being against sound policy and *quasi* extortion. English judges have declared that such claims by them are novel in courts of justice, and that actions founded on such promises are scandalous and shameful. 2 Burr. 924 ; and in the Court of Errors in New York they meet with no more favor. 15 Wend. Rep. 46.

While the counsel for the plaintiff does not controvert these principles, their application to the case at bar is strenuously denied. It is said the \$300 is not claimed for executing the writ as constable by the plaintiff. For that service he was entitled to his legal fees, without any regard to the proceeding resulting in the conviction of the accused and the return of the money, and that this official act of his neither makes his claim to the reward better or worse than it would have been had the same official act been done by some other official personage.

But it will be seen that this view of the case can by no means be sustained. It is not the case made by the declaration. The promise of the reward, as laid, is for the apprehension of the thief and money ; and this arrest of the thief and seizure of the money are averred to have been made by the plaintiff by virtue of a warrant delivered to him as constable. The promise is, therefore, illegal and void. True, it is stated the plaintiff searched out the thief and ascertained where the money was, and made the oath on which the warrant issued, but for this service no promise of reward is laid. It is for the apprehension of the thief and seizure of the money, and as this was done in virtue of his office, the plaintiff must be content with his legal fees and the reflection that he has done the State some service.

Demurrer sustained, and judgment for defendant.

REIF v. PAIGE.

IN THE SUPREME COURT OF WISCONSIN, OCTOBER 10, 1882.

[Reported in 55 Wisconsin Reports 496.]

APPEAL from the Circuit Court for Winnebago County.

During the afternoon of December 3d, 1880, a hotel in the city of Oshkosh, known as the "Beckwith House," was destroyed by fire. The defendant and his wife lived in this hotel, occupying rooms in the fourth story. When the fire broke out Mrs. Paige was in those rooms and perished in the flames. The members of the Fire Department of Oshkosh placed a ladder at a window near where Mrs. Paige was supposed to be, and at least two firemen attempted to enter the window and rescue her, but were driven back by the smoke and flames. The ladder was then removed, but subsequently was replaced at the same window. About this time, and after the fire had been raging thirty minutes or more, the defendant, who had been absent, reached the scene of the fire, and, as it is alleged in the complaint, offered and promised to pay a reward of \$5000 to any person who would rescue his wife from the burning building, dead or alive. The plaintiff claims that he has earned the reward thus offered, and has brought this action to recover the same.

The complaint alleges that the plaintiff, on being informed of such offer and promise, and confiding in and relying upon the same, entered such rooms in the fourth story of the burning building, at great peril to his life and health, removed therefrom the dead body of Mrs. Paige, and delivered the same to the defendant. Also that the plaintiff has performed all of the conditions of said contract on his part to be performed; that no part of the said \$5000 has been paid to him, and that the same is now due and payable.

In his answer the defendant denies that he offered any reward for the rescue of his wife from the burning building, and also denies an averment in the complaint that the Fire Department was unable to remove her therefrom. He alleges therein that the body of his wife was recovered by members of that department; that the plaintiff was an assistant engineer and a paid officer in that department, and whatever he did in the recovery and removal of the body of Mrs. Paige was done as such officer and member of the Fire Department, and in the performance of his duties as such.

The testimony on the trial tended to prove that the defendant offered the reward, and that with knowledge of the offer and on the faith of it, and for the purpose of earning the reward, the plaintiff ascended the ladder, entered the building, and rescued the dead body of Mrs. Paige from the flames, to the knowledge of the defendant. No formal notice was given by the plaintiff to the defendant before this action was commenced, that the former had acted in the premises upon such offer, and claimed the reward; and no demand therefor was made upon the defendant. The Circuit Court nonsuited the plaintiff, and judgment against him was entered accordingly. The plaintiff appealed from that judgment.

Finch & Barber and *Charles W. Felker* for the appellant, and oral argument by *Barber*.

Gary & Berry and *Moses Hooper* for the respondent, and oral argument by *Hooper*.

LYON, J. 1. It is maintained on behalf of the defendant that in no event was there a cause of action against him until after due notice to him that the plaintiff had rescued the body of his wife from the flames, with knowledge of the offer of a reward for so doing, and on the faith of that offer; in other words, that such notice is a condition precedent to the plaintiff's right of action. If this position is correct, the performance of such condition precedent must be averred in the complaint, either specifically or by authorized general averment, and, if denied, must be proved on the trial or the plaintiff cannot recover. The complaint alleges that "the plaintiff has fully performed all of the conditions of said contract upon his part to be performed." This mode of pleading performance of conditions precedent is authorized by statute, and hence the same are sufficiently pleaded. R. S., 728, § 2674. The answer does not deny that averment of the complaint, either specifically or by general denial. Hence, the plaintiff was not required to prove the averment on the trial. Moreover, the failure to give such notice (if the notice was required) goes only in abatement of the action, and it may well be doubted whether even a general denial would make an issue on the question as to whether the notice had been given. It would seem that, regularly, mere matter in abatement of an action, to be available, should be pleaded, especially when, as in this case, such matter is negatived in the complaint. However, the point is not here determined. But inasmuch as the defendant introduced evidence, without objection, tending to show that he received no such notice of the plaintiff's acceptance of the alleged offer of a reward, and as it is quite competent for the Court to permit an

amendment making the answer correspond with the proofs in that behalf, it becomes our duty to determine the question of the necessity of such notice.

The offer of a reward by the defendant for rescuing the body of his wife, and the rescue of her remains by the plaintiff, with knowledge of such offer, and with a view to obtaining the reward offered, constituted a contract between the parties, which was fully and completely executed by the plaintiff. The offer, which the proofs tend to show the defendant made, was, in substance, "I will give \$5000 to any person who will bring the body of my wife out of that building, dead or alive." There were no restrictions or limitations to the offer, and no additional requirement upon the claimant of the offered bounty. Hence, when the plaintiff, with a view of obtaining the offered reward, rescued the body of Mrs. Paige, he had done all that the offer required him to do, and if he has any cause of action it was then complete. There may be a conflict of authority on this question, but it seems to us that the better reasons are with the cases cited on behalf of the plaintiff, holding that in such a case the giving of the notice is not a prerequisite to maintaining an action for the reward. The soldiers' bounty cases in this Court, cited in opposition to this view, are not in point, because in those cases it was absolutely necessary that the towns or municipalities should know when their quotas were full. Hence the necessity that each person who enlisted for the bounty should promptly notify the proper authorities of the town or city to which he was credited of the fact of his enlistment. No such reason exists here for requiring notice. There is no more hardship in this rule than in the rule which allows the endorsee and holder of an overdue negotiable promissory note to sue the maker thereon without giving him an opportunity to pay it without suit. The maker may have been ready and anxious to pay it at the time it became due, had he known where it was. Yet the holder may sue it at his leisure, and compel the maker to pay costs, and, in general, the accrued interest as well. That hardship is possible because the contract evidenced by the note is complete, and nothing remains to be done by the holder after the note becomes due to give him a right of action upon it. On precisely the same principles we think in this case that after the plaintiff had performed the only condition stipulated for in the alleged offer, his right of action was complete, without doing any other act whatever.

2. The learned circuit judge nonsuited the plaintiff on the ground that it was his duty as a paid officer and member of the Fire Department of Oshkosh to rescue persons as well as prop-

erty from fires, and that it is against sound public policy to allow him to contract for a reward for recovering the body of Mrs. Paige. Also that in such a case there is no valid consideration for the offer, moving from one whose duty it is to do the act. The learned counsel for the respective parties have argued this branch of the case (as well as the other), with great candor and ability, and each has cited numerous adjudications in support of his theory of the case. Their arguments and concessions have brought the question upon which the case must turn within very narrow limits. Counsel for the plaintiff concedes that if it was the duty of his client as a fireman to go into the burning building and remove therefrom the remains of Mrs. Paige, he cannot recover the reward, but contends that it was not his duty to do so under the circumstances of the case. Counsel for the defendant, while not contending that it was the duty of the plaintiff as a fireman to imperil his life by going into the building for Mrs. Paige, or that the act was not a very perilous one, maintains that it was in the nature of extra or extra hazardous services in the line or scope of his duty, and, being so, the law will not permit him to contract for a reward for doing the act.

There was considerable discussion by counsel as to what are the duties of firemen. We know of no guide for ascertaining those duties other than the charter of the municipality in which they are employed, and the ordinances or by-laws enacted pursuant thereto. The ordinances of the city of Oshkosh in respect to its Fire Department were read in evidence, and reference made to the city charter in that behalf. We do not care to comment upon these, for we are clear that there is nothing in them which made it the duty of the plaintiff to enter the fourth story of the burning building and rescue the body of Mrs. Paige from the flames, at the imminent hazard of losing his own life. That he incurred such hazard there can be no doubt from the testimony. He did not, as does a soldier, contract to risk his life in the service. The most that can reasonably be claimed is that, short of risking his life, he contracted to use his best judgment and efforts in extinguishing fires, and in saving persons and property from destruction or injury. But it is quite doubtful whether a fireman employed under the charter and ordinances of Oshkosh owes any duty, *as a fireman*, to rescue persons from burning buildings. Both charter and ordinances are silent on the subject, although an ordinance requires them to aid in the removal of endangered goods and property. It may well be that for the rescue of persons in peril from a conflagration the Legislature or Common Council relied upon the

promptings of humanity which in such emergencies always insures the utmost efforts of all who can aid therein, whether firemen or not, to save the lives of those in peril. But whether a fireman owes any such duty by reason of his employment is not here determined. We assume, for the purposes of this case, that he does, and have stated above the limits of that duty, if it exists.

On this hypothesis, the precise question to be determined is whether the fact that it was not, under the circumstances, the duty of plaintiff as a fireman to rescue the body of Mrs. Paige, renders him competent to make a valid contract for a reward for so doing. It is difficult to perceive how it can properly be said that it was within the scope or line of the plaintiff's duty to do the act, when it was not his duty to do it. It is conceded, for the purposes of the case, that it was his duty as a fireman to rescue Mrs. Paige from the flames if he could do so without hazarding his own life. It was not his duty to do so at the hazard of his life. Can it properly be said that it was in the line or scope of his duty to rescue her at the imminent peril of losing his life, when his duty did not require him to do so? We confess our inability to perceive any satisfactory grounds upon which this question may be answered affirmatively.

In the law of agency we find that principals are often held responsible for the unauthorized acts of their agents because such acts are within the scope of the authority of such agents, although not within their actual authority. The principal is held in such a case because he has clothed his agent with *apparent* authority to do the act, and a person to whom the agent is accredited may deal with him on the faith that he has the authority to bind his principal which he *appears* to have, and may hold the principal as effectually as though the agent had actual authority in the premises. Hence, when it is said that a given act of an agent, although unauthorized, is within the scope of his authority, and therefore binds his principal, it only signifies that the principal has *apparently* given his agent authority to do the act, and, as against a person dealing with the agent in good faith, he shall not be heard to deny the agent's authority.

But where the question is one of *duty*, there seems to be no room for the application of any such principle. If it is not the duty of a person to render a specified service, we fail to comprehend how it can correctly be said that the service is within the line or scope of his duty—that is to say, that although it is not actually his duty to render the service, yet, because it is his apparent duty to do so, he shall be held to the same conse-

quences as though it were his actual duty. It seems to us that the mere statement of the proposition is sufficient to show that it is untenable.

The respective counsel have cited and commented upon numerous cases bearing upon the question under consideration. There is some apparent conflict of doctrine in them. In many of those cited on behalf of the defendant, claimants of rewards have been defeated because (as it is said) it was within the line or scope of their duties as officers, or otherwise, to render the services for which the rewards were offered. Yet in some of these cases it was held that it was the duty of the claimants to render those specific services. The cases cited on behalf of the plaintiff fully sustain the position of his counsel, that, unless it was the duty of the plaintiff as a fireman to rescue the body of Mrs. Paige, he is in a position to claim the alleged reward. A reference to these cases will be found in the report of the arguments, and it is unnecessary to cite them here. To state these cases in detail, and to comment upon them here, would unreasonably extend this opinion, which, perhaps, is already too long, and would serve no useful purpose. We must content ourselves, therefore, with the foregoing general observations upon them.

It follows, from the views above expressed, that inasmuch as the plaintiff could not rescue the body of Mrs. Paige from the burning building without imminent peril of losing his own life, and inasmuch as it was not his duty as a paid officer and member of the Fire Department to do so, he is in a position to claim the reward alleged to have been offered by the defendant for such rescue.

The judgment of nonsuit must be reversed, and the cause will be remanded for a new trial.

By the Court. It is so ordered.

EMIL HARRIS, RESPONDENT, v. A. P. MORE, APPELLANT.

IN THE SUPREME COURT OF CALIFORNIA, AUGUST 28, 1886.

[*Reported in 70 California Reports 502.*]

APPEAL from a judgment of the Superior Court of Santa Barbara County, and from an order refusing a new trial.

The action was brought to recover for certain services performed under an agreement stated in the opinion. The further facts are stated in the opinion of the Court.

Thomas McNulta, A. A. Oglesby and W. E. Shepherd for appellant.

W. T. Williams and W. C. Stratton for respondent.

MYRICK, J. The defendants executed an agreement in writing to pay moneys to any person furnishing evidence which would lead to the conviction of persons implicated in the commission of a crime. The agreement was delivered to the plaintiff. It contained a clause agreeing to pay plaintiff certain expenses in investigating the matter of the offence. The plaintiff rendered services in regard to discovering evidence and causing the same to be produced at the trial. The plaintiff was deputy sheriff of Los Angeles County, and the offence was committed and the trial had in another county.

As the plaintiff had no legal duty to perform, by virtue of his office of deputy sheriff, in regard to discovering the evidence and causing it to be produced, having no writ to execute, and the offence having been committed and the trial had out of his county, we do not think the policy of the law forbade his receiving the compensation. It was not compensation for the performance of any duty enjoined upon him by law.

No error appears in the transcript.

Judgment and order affirmed.

MCKINSTRY, J., and MORRISON, C.J., concurred.

Hearing in Bank denied.

(f) *Forbearance or compromise as a consideration.*

LOYD v. LEE.

AT NISI, BEFORE PRATT, C.J., 1718.

[*Reported in 1 Strange 94.*]

A MARRIED woman gives a promissory note as a *feme sole* ; and after her husband's death, in consideration of forbearance, promises to pay it. And now in an action against her it was insisted that though she being under coverture at the time of giving the note, it was voidable for that reason ; yet by her subsequent promise, when she was of ability to make a promise, she had made herself liable, and the forbearance was a new consideration. But the Chief Justice held the contrary, and that the note was not barely voidable, but absolutely void ; and for-

bearance, where originally there is no cause of action, is no consideration to raise an *assumpsit*. But he said it might be otherwise where the contract was but voidable. And so the plaintiff was called.

ANONYMOUS.

IN THE KING'S BENCH, JUNE 16, 1774.

[*Reported in Cowper 128.*]

UPON a rule to show cause why upon filing common bail a *supersedeas* should not issue as to this action to discharge the defendant out of jail ; Mr. Cowper showed for cause that though the debt was originally under £10, yet after judgment obtained and *costs* taxed, the whole sum amounted to £17 ; and that upon a writ of execution being sued out, the defendant, in consideration that the plaintiff would stay the execution at that time, undertook and promised to pay the debt and costs. That several applications had been since made to the defendant for payment without effect, and, therefore, he was now held to bail upon his new *assumpsit* for the £17.

WILLES, J., mentioned the case of *Palmer v. Nedham*, 3 Burr, 1389, where the plaintiff, whose original demand was only £3 13s. 6d. having obtained judgment, brought an action of debt thereupon for the debt and costs, amounting in the whole to above £10, and held the defendant to special bail. But upon showing cause why *common* bail should not be accepted, and the bail-piece discharged, the Court ordered it accordingly.

LORD MANSFIELD. This is a new species of action, and an attempt to turn a judgment debt into a debt upon simple contract. If the undertaking had been by a third person in consequence of the forbearance, it would have been a good ground of *assumpsit* against such third person. But here the promise is by the defendant himself to pay a debt to which he was before liable upon record, for by the judgment he is liable to the costs as well as to the debt. And, therefore, I am of opinion that such promise is no ground upon which to raise an *assumpsit*.

ASHURST, J. I am of the same opinion. This promise is no waiver or extinguishment of the judgment debt, but it still remains a lien upon the land.

Rule made absolute.

JONES v. ASHBURNHAM AND NANCY, HIS WIFE.

IN THE KING'S BENCH, JANUARY 31, 1804.

[*Reported in 4 East 455.*]

THE plaintiff declared that whereas one S. F. Bancroft, since deceased, at the time of his death was indebted to him in £58 for goods before that time sold and delivered to the deceased, whereof the defendant Nancy had notice, and thereupon, after the death of Bancroft, the defendant Nancy, before her intermarriage with the other defendant, Ashburnham, in consideration of the premises, and also in consideration that the plaintiff, at the special instance and request of the defendant Nancy, would forbear and give day of payment of the said £58 as after-mentioned, she, the said Nancy, by a note in writing signed by her according to the form of the statute, etc., on March 20th, 1801, undertook and promised the plaintiff to discharge the said debt so due and owing to him in a reasonable time, and to send him £20 in part payment in the July following. And although the same July is long since passed, during which the said Nancy continued sole, and a reasonable time elapsed for the payment of the whole £58, according to the tenor and effect of the said promise, and though the plaintiff has always from the time of making the said promise hitherto forborne and given day of payment of the said debt, whereof the defendant Nancy before her intermarriage, and both the defendants since their intermarriage, have had due notice, yet the defendants have respectively, etc., refused to pay, etc. There were other counts in substance the same; one alleging the forbearance to be till July, etc. To all which there was a demurrer, assigning for special causes; that it is not alleged in the declaration from whom the said sum of £58 therein mentioned was due and owing to the plaintiff at the time when the defendant Nancy is supposed to have made the promise and undertaking mentioned, or that any persons or person were or was then liable to pay the plaintiff that sum; and that it is not alleged to whom the plaintiff hath forborne and given day of payment of the said £58; and that the declaration does not disclose any legal and sufficient consideration for the supposed promise; nor does it thereby appear that the plaintiff has any good cause of action against the defendants, etc.

Marryat in support of the demurrer.

Jervis, contra.

LORD ELLENBOROUGH, C.J. The way in which I am disposed to consider this case will break in upon no recognized rule of law, nor on the plain sense of what was laid down by Yates, J., in the case of *Pillans v. Van Mierop*. It is a known rule of law, that to make a promise obligatory there must be some benefit to the party making it, or some detriment to the party to whom it is made ; otherwise it is considered as *nudum pactum* and cannot be enforced. I do not say that the opinion which I have formed will not break in on any of the cases which have been cited, but it intrenches on no general rule ; and in order to show that, I will examine the rule referred to as laid down by Yates, J., and see how it applies to the present case. He says that "any damage to another, or suspension or forbearance of his right, is a foundation for an undertaking," etc. Now how does the plaintiff show any damage to himself by forbearing to sue when there was no fund which could be the object of suit, where it does not appear that any person in *rerum naturâ* was liable to be sued by him ? No right can exist in this vague, abstract, and indefinite way. Right is a correlative term ; there must be some object of right, some object of suit ; some party who, in respect of some fund or some character known in the law is liable ; otherwise there cannot be said to be any right. Has there been then any suspension of the plaintiff's right ? Now unless a right is capable of being exercised, unless it can be put in force, there can be no suspension of it. And that it could have been exercised or put in force but for the promise made by the defendant is not shown. Then what forbearance is shown ? It must be a forbearance of a right which may be enforced with effect. It is true that a promise may be binding though there may be no actual benefit resulting to the party making it, because it is enough if the plaintiff may be damaged by it ; but it does not appear here that the forbearance could produce any detriment to the plaintiff. It does not therefore appear that Yates, J., laid down any doctrine which does not square with the general received rule of law, that to sustain a promise there must be a benefit on the one hand or a detriment on the other. But here, whether there were any representative or any funds of the original debtor does not appear. Then, as to the cases cited, that of *Rosyer v. Langdale* is strong to the purpose, for it was there decided that a promise in consideration that the plaintiff would forbear suit until the defendant had taken out letters of administration was without foundation, because it did not appear that the party was liable before administration taken out. And this was rightly determined, for forbearance of an unfounded suit is no

forbearance. But this case is attempted to be met by that of *Hume v. Hinton*, in the same book, where a promise by the mother of an intestate indebted to the plaintiff, that if he would stay for the money till a given day she would pay it, was sustained. That, however, was after verdict; and that is material to be attended to, because it might be presumed to have been proved that the defendant had so intermeddled with the intestate's effects as to make herself liable as executrix *de son tort*, and had funds of the deceased in her hands for which, but for the promise made, she might have been sued in that character. But no such intendment can be made here. The case of *Quick v. Copleton* is also relied on. That too was after verdict, and it was moved in arrest of judgment for want of consideration. I think that even after verdict that declaration would be bad, being vicious on the face of it. It is stated that the defendant's late husband was indebted to the plaintiff, and that she (not stating her to be clothed with any representative character) about to come to London, and being in fear to be arrested by the plaintiff, promised, etc. Now an attempt to impose upon a person an unlawful terror (and the threatening of an unlawful suit is as bad) can never be a good consideration for a promise to pay; yet that ground is insisted on by the Chief Justice. And as to the case there cited by him of a mother who promised to pay, on forbearance of the plaintiff to arrest the dead body of her son, which she feared he was about to do, it is contrary to every principle of law and moral feeling. Such an act is revolting to humanity and illegal, and therefore any promise extorted by the fear of it could never be valid in law. It might as well be said that a promise, in consideration that one would withdraw a pistol from another's breast, could be enforced against the party acting under such unlawful terror. Here, there being no consideration of benefit to the defendant, or of detriment or possibility of detriment to the plaintiff, shown by him on the face of the declaration, and this coming on upon demurrer, where nothing can be intended, as it may after verdict, I am clearly of opinion that the declaration is bad.

GROSE, J. It must be admitted that if a consideration for the promise does not sufficiently appear upon the face of the declaration it cannot be supported. There is a great difference between questions of this sort, arising upon demurrer to the declaration, and in arrest of judgment after verdict; in which latter case everything is to be intended which can be in favor of the verdict, but not so on demurrer. It is, however, said that a detriment to the plaintiff will support an *assumpsit* as well as a benefit to the defendant, and that here the plaintiff alleges a

forbearance. But it is a perversion of terms to call that a forbearance to sue if there were no person who was capable of being sued, and here none is shown. There can be no forbearance in such a case, and therefore there is an end of the consideration. This is too plain to require anything further to be said upon it, and makes it unnecessary, after what my Lord has said, to enter into the consideration of the cases.

LAWRENCE, J. This question arises upon a special demurrer, which points out an objection to the declaration, that no person is stated who was liable to be sued at the time of the promise made, in respect to whom the plaintiff can be said to have forbore suit. And on this ground the case is distinguishable from those relied on by the plaintiff's counsel, which were after verdict; and in support of which it might be said that when the jury found that the plaintiff did forbear to sue, they must be presumed to have found, upon proof laid before them, that there was somebody who could have been sued. But no such intendment can be made upon demurrer. The argument proceeds upon a fallacy, in supposing that some person must exist liable to the plaintiff's suit, to forbear whom must consequently be a disadvantage to him and a consideration for the defendant's promise. But that is not so. The deceased might leave no assets, and there might be no administration to him taken out; there would then be no person to sue. So he might be a bastard and have no legal representatives entitled to take out administration of his effects, in which case the Crown would be entitled to them, and still there would be nobody to be sued. It is not, therefore, true that there must be somebody liable to whom a forbearance to sue may refer. And I agree with the argument of the defendant's counsel that if it be no consideration for the promise to forbear to sue the defendant without showing that the defendant was before liable to have been sued, it can be no consideration for a promise to forbear to sue all the world generally without showing that some person or other was liable to be sued, for without that the plaintiff does not show any detriment arising to him from the forbearance of his suit. The principle is admitted that the plaintiff must show some benefit to the defendant or some detriment to himself. And I understand Yates, J., in illustrating that principle in the passage cited, to say that where it appears on the face of the declaration that there is somebody whom the plaintiff may sue, it is not necessary to show that he would be benefited by suing him; it is sufficient that there is some person whom he might sue, and from whom he might obtain satisfaction.

LE BLANC, J. The definition by Yates, J., of a consideration

sufficient to maintain a promise is, that it be either of some benefit to the defendant or some detriment to the plaintiff. It is sufficient, if it be a detriment to the plaintiff, though no actual benefit accrue to the party undertaking. So far only the definition goes. Afterward, indeed, in commenting on that definition, he says, that the promise of the defendant did occasion a possibility of loss to the plaintiffs. They might, he says, have been thereby prevented from resorting to the original debtor, or getting further security from him. But all this latter part is only a comment on the definition, and showing how the case then in judgment applied to it. But I do not take it to be any part of the definition itself intended to be laid down by him, that if any person stated that he had forborne suing on a cause of action which might (or might not) by possibility occasion a loss to him, that was a sufficient ground for an undertaking by another to pay him. Now here the plaintiff endeavors to make out a detriment to himself by showing that one deceased was indebted to him, and that in consideration that he would forbear and give day of payment the defendant promised, etc. But it does not follow of course from thence that any detriment arose to the plaintiff from his forbearance if it do not appear that there was any person whom he could have sued. And the general current of authorities shows that it is not sufficient to state a consideration to forbear generally, unless it be also shown that there was some person to be forborne. Now here the declaration does not state that there was any representative of the debtor, or that any person had taken out administration to him, or that any person was going to administer to the effects and to satisfy the plaintiff's debt, but was prevented from so doing by the undertaking of the defendant. There, therefore, appears to be a want of consideration to sustain the promise.

Judgment for the defendant.

SMITH *v.* ALGAR.

IN THE KING'S BENCH, NOVEMBER 26, 1830.

[*Reported in 1 Barnewall & Adolphus 603.*]

ASSUMPSIT. The first count stated that the plaintiff had obtained judgment against one Elizabeth Mackenzie for a debt of £57 6s. costs, and for satisfaction thereof had sued out a writ of *feri facias* to levy the said debt and costs of the goods of the said Elizabeth Mackenzie; that the plaintiff was about to enforce the execution of the said writ, and to levy to the amount of £107 upon goods of Elizabeth Mackenzie of the value of £200, which the defendant had in his custody; and that afterward, in consideration of the premises, and that the plaintiff, at the defendant's instance, would forego executing the writ against the said goods for the recovery of the said sum of £107, defendant undertook to pay plaintiff the last-mentioned sum in seven days then next following; that plaintiff forbore accordingly, but defendant did not pay. The second count stated the consideration to be, that the plaintiff would forbear executing a writ of *feri facias* issued against the goods of Elizabeth Mackenzie, not saying at whose suit or for what sum. The defendant demurred specially to each count, and there was a joinder in demurrer.

Platt in support of the demurrer.

Kelly, contra, was stopped by the Court.

LORD TENTERDEN, C.J. I agree in the principles laid down in the cases which have been cited, but they do not appear to me to be applicable. It is true, the plaintiff might not, perhaps, have been entitled to recover to the full extent of £107, though, it is to be observed, he might have levied the costs of the execution in addition to the sum given by the judgment. But he had a right, at least, to levy £60, and if, in consideration of his forbearing that, the defendant promised to pay him the larger sum—if the inconvenience of an execution against these goods at the time in question was so great that the defendant thought proper to buy it off at such an expense—I do not see that the consideration is insufficient for the promise.

PARKE, J. If a plaintiff has a *feri facias* endorsed to levy £60, there is no reason why the forbearing to execute such writ should not be a good consideration for a promise by a third person to pay double the amount at the end of seven days

What damages the plaintiff may recover in an action on such promise is another question.

TAUNTON and PATTESON, JJ., concurred.

Judgment for the plaintiff on the first count.

MORTON *v.* BURN AND VAUX.

IN THE KING'S BENCH, JUNE 12, 1837.

[*Reported in 7 Adolphus & Ellis 19.*]

ASSUMPSIT. The first count of the declaration stated that, whereas, before and at the time of making the promise, etc., to wit, April 12th, 1834, the defendants were indebted to the plaintiff in £728 2s. 6d., and interest thereon from February 1st, 1834, under and by virtue of a bond dated July 14th, 1832, and a certain indenture and deed of assignment thereof dated October 19th, 1833, and that, according to the condition of the said bond, £228 2s. 6d., part of the said sum of £728 2s. 6d. ought to have been paid on February 1st then last past, and thereupon, in consideration of the premises, and also in consideration that plaintiff would accept and receive payment of the said sums of money on the days and times after mentioned, and, in the mean time, give time to defendants for payment, the defendants undertook, etc., that the whole of the said £228 2s. 6d., with interest from February 1st, 1834, should be paid to plaintiff on or before June 1st then next, or, in default thereof, that defendants would sign a warrant of attorney to plaintiff to enter up judgment against them forthwith for the same; and that defendants would pay to plaintiff £50 quarterly, on September 1st, etc., in every year, until the further sum of £500 (residue of the said £728 2s. 6d.), with interest at £5 per cent per annum, should be fully paid and satisfied; and, in default of paying any of the last-mentioned instalments, defendants would execute a warrant of attorney to plaintiff forthwith to enter up judgment against them for the whole £500 and interest, or so much thereof as might then remain due; averment that plaintiff did forbear and give time to defendants for the payment of the said £728 2s. 6d., and interest, until and upon the respective days and times mentioned for payment thereof in the said promise and undertaking of the defendants; and, although defendants paid plaintiff the said £228 2s. 6d. and interest thereon, yet they did not nor would pay plaintiff £50 quarterly,

on the days and times above mentioned in that behalf, but therein wholly made default ; and a large sum of money of the said instalments—viz., £250, for five several sums of £50 respectively due on September 1st, 1835, etc., now is wholly due and in arrear, etc.; and, although defendants made default in payment of the respective sums on the days and times aforesaid, according to the tenor and effect, etc., of their said promise and undertaking, yet defendants did not nor would execute a warrant of attorney to enable plaintiff forthwith to enter up judgment against them for so much of the £500 and interest as then remained due, etc. There was a second count on an account stated, and for interest.

Pleas 1. *Non assumpsit*. 2. To the first count, that there was not any good or valuable consideration for the promises in the first count mentioned ; conclusion to the country. Issues on both pleas.

On the trial before Coleridge, J., at the Middlesex sittings after Michaelmas Term, 1836, a verdict was found for the plaintiff. In Hilary Term last, F. Edwards obtained a rule *nisi* for arresting the judgment.

Cresswell and *W. H. Watson* now showed cause.

F. Edwards, contra.

LORD DENMAN, C.J., in this term (June 12th), delivered the judgment of the Court.

This is a motion in arrest of judgment. The question is, whether forbearance for a given time on the part of the assignee of a bond to sue the obligors, is a good consideration for a promise by the obligors to pay the assignee at the expiration of that time, or give him a warrant of attorney for the amount.

It was objected that there is no mutuality in the agreement ; for that, if the plaintiff had sued the defendants in the obligee's name, the promise to forbear would be no answer. Again, that this is a mere *nudum pactum*, being only a promise to do that which the defendants were already bound to do by their bond. And, further, that, if this promise be binding, it amounts to varying a deed by parol contract, which is contrary to the rule of law. We do not think any of these objections sufficient to arrest the judgment.

As to the first, there is sufficient mutuality ; for, although the agreement to forbear would not be pleadable to an action in the name of the obligee, yet, unless the plaintiff did forbear according to his agreement, he would not be able to sue on the defendants' promise. He is obliged to aver, as he does in the present declaration, that he has forborne, which is a condition precedent to his suing.

As to the second objection, this is not a mere *nudum pactum*, for the defendants promise to pay the plaintiff, a third person, whom they were not bound to pay by their bond ; and they promise, in consideration of a detriment sustained by the plaintiff at their request—namely, a forbearance to enforce his right in the name of the obligee.

As to the third objection, the bond is in no respect varied by this agreement. The new contract entered into by the defendants with the plaintiff leaves the bond just as it was before : it was forfeited before the agreement, and so it remains ; and the agreement would be no answer to an action on it.

The cases on this subject are collected in Williams's notes to *Forth v. Stanton*¹ and to *Barber v. Fox*,² to which may be added *Yard v. Eland*,³ and other cases collected in Comyns's Digest, Action on the Case upon Assumpsit, Consideration (B). They are all in favor of the action lying, with the exception of *Potter v. Turner*,⁴ which we think inconsistent, not only with the current of authorities, but with established principles.

For these reasons we are of opinion that the rule to arrest the judgment in this case must be discharged.

Rule discharged.

WADE v. SIMEON.

IN THE COMMON PLEAS, JANUARY 21, 1846.

[*Reported in 2 Common Bench Reports* 548.]

ASSUMPSIT. The first count of the declaration stated that, before and at the time of the making of the promise thereafter next mentioned, an action on promises had been commenced, and prosecuted by, and at the suit of the plaintiff against the defendant, in the Court of Exchequer, that the plaintiff had declared in the said action against the defendant for the non-performance by the defendant of certain promises in the declaration alleged to have been made by the defendant to the plaintiff for the payment by the defendant to the plaintiff of two sums, one amounting to £1300 and the other amounting to £700, and the said action was so commenced and prosecuted, and the defendant declared therein as aforesaid, for the recovery of these sums and the damages by him sustained by the non-performance by the defendant of his promises in respect of the

¹ 1 Wms. Saund. 210, note 1.

² 2 Wms. Saund. 137, note 2.

³ 1 Lord Raym. 368.

⁴ Palm. 185 ; S. C. Winch 7.

same, parcel of such damages, being interest upon the said sum of £1300 from May 25th, 1840, until payment of the said sum of £1300, and other parcel of such damages being interest upon the said sum of £700 from July 4th, 1840, until payment of the said sum of £700; that, before and at the time of the making of the promise of the defendant thereafter mentioned, the defendant had pleaded divers pleas to the said declaration, and divers issues had been, and were joined between the plaintiff and the defendant in the said action, and the plaintiff had given due notice for the trial of the same, and the same were about to be tried at, etc., and the plaintiff had, according to the course and practice of the said Court, duly entered the *nisi prius* record in the said action for the said trial, and the said trial was duly appointed and fixed to take place on December 7th, 1844, and the same would have taken place had it not been for the promise of the defendant as thereafter mentioned; that, before and at the time of the making of the promise of the defendant as thereafter mentioned, the plaintiff had been put to, and incurred divers costs and charges amounting, to wit, to £300, in and about the said action; that, before and at the time of the making of the defendant's promise thereafter mentioned, the defendant had, to wit, on December 3d, 1844, caused the plaintiff to be served with a notice that the defendant would apply to and move Her Majesty's High Court of Chancery, for an injunction by that Court to restrain the plaintiff from issuing execution in the said action on any judgment obtained by him, in case the plaintiff should obtain such judgment; that thereupon, to wit, on December 6th, 1844, being the day next before the day when the said trial was so appointed and fixed to take place as aforesaid, in consideration that the plaintiff would forbear prosecuting and would stay all proceedings in the said action until and upon December 14th, 1844, save and except the taxation of the said costs and charges, and the obtaining and drawing up of an order therein as thereafter mentioned, he the defendant promised the plaintiff that he the defendant would on that day pay him the said sums of £1300 and £700, and interest thereon respectively as aforesaid, together with the said costs and charges, to be taxed, and that, in the event of the defendant's not paying the same, the defendant would suffer, and the plaintiff should be at liberty to sign judgment in the said action, and that a judge's order should and might be obtained and drawn up in the said action, to secure such payment, and that the said notice and the said application to, and motion in the said Court of Chancery, should be abandoned. Averment, that the plaintiff, confiding in the said promise of

the defendant, then, to wit, on December 6th, 1844, withdrew the said record, and forbore prosecuting, and stayed all further proceedings in the said action until and upon the said December 14th, 1844, save and except the taxation of the said costs and charges, and the obtaining and drawing up of the said order to be so obtained and drawn up as aforesaid, and, save and except as aforesaid, the plaintiff had from thence continually forbore to prosecute, and had stayed all further proceedings in the said action; that, after the making of the said promise, and before the said December 14th, 1844, to wit, on December 11th, 1844, the costs and charges of the plaintiff which he had been put to and incurred in and about the said action, and which the defendant promised to pay as aforesaid, were duly taxed at £81 1s. 10d., whereof the defendant then had notice; and that, although the said December 14th, 1844, had elapsed before the commencement of the suit, and although the said interest so promised to be paid as aforesaid on the said December 14th, 1844, amounted to a large sum, to wit, £451 13s. 3d., yet the defendant, although often requested by the plaintiff so to do, had not as yet paid the plaintiff the said sum of £1300 and £700, and the said interest amounting to £451 13s. 3d., and the said costs and charges amounting to, and so taxed at £81 13s. 10d. as aforesaid, or either of them, or any part thereof, and the same remained wholly due and unpaid to the plaintiff; that the defendant did not nor would suffer or permit the plaintiff to sign, and afterward, and after the said December 14th, 1844, to wit, on, etc., and from thenceforward wholly hindered and prevented the plaintiff from signing judgment in the said action; that the defendant afterward, to wit, on January 27th, 1845, obtained a rule and order of the said Court for setting aside a certain order before then, to wit, on December 6th, 1844, made by Alderson, B., and drawn up in pursuance of the said promise, and according to the same; and that by means of the premises the plaintiff had been delayed in, and hindered and prevented from recovering the said sums and moneys so promised by the defendant to be paid as aforesaid.

There was also a count upon an account stated.

Fourth plea—to the first count—that the plaintiff never had any cause of action against the defendant in respect of the subject-matter of the action in the Court of Exchequer in that count mentioned; which he, the plaintiff, at the time of the commencement of the action, and thence until and at the time of the making of the promise in the said first count mentioned well knew—verification.

Seventh plea—to both counts—that the action in the first

count mentioned was brought in respect of two checks, one for £1300, and the other for £700, and that, after the *nisi prius* record in that count mentioned had been entered, to wit, on, etc., the defendant, with the consent of the plaintiff, obtained an order in the said cause in that count mentioned, to be, and the same was, made by Alderson, B., which order was, and is as follows—that is to say: “Wade v. Simeon. Upon hearing the attorneys or agents on both sides, and by consent, I do order, that, upon payment of £2000, and interest on the two checks, from the date thereof until payment, the debt due from the defendant to the plaintiff for which this action is brought, together with costs, to be taxed and paid on or before December 14th instant, all further proceedings in this cause to be stayed; and I further order, that, in case default be made in payment as aforesaid, the plaintiff shall be at liberty to sign final judgment, and issue execution for the whole amount remaining unpaid at the time of such default, with costs of judgment and execution, sheriff’s poundage, officers’ fees, and all other incidental expenses, whether by *fi. fa.* or *ca. sa.* Dated, etc.,” that the promise in the said first count mentioned—that the defendant would, on said December 14th, pay to the plaintiff the said sums of £1300 and £700 and interest thereon respectively as aforesaid, together with the said costs and charges, to be taxed, and that, in the event of the defendant’s not paying the same, the defendant would suffer, and the plaintiff should be at liberty to sign judgment in the said action—was a promise deduced and implied from the obtaining and the making of the said order as aforesaid, and was thereby, and in no other way made to the plaintiff as in the said count alleged; that the promise in the second count mentioned was a promise deduced and implied from the obtaining and making of the said order thereinbefore mentioned, and from the ascertaining, by taxation, of the amount of the costs to be paid pursuant to the said order, and was thereby and in no other way made to the plaintiff as in the said second count alleged; that, after the making of the said order, and before the time thereby appointed for payment, to wit, on December 13th, the defendant obtained from Parke, B., a summons in the said cause, which summons was and is as follows—that is to say, etc. [setting out a summons, returnable on the following day, calling on the plaintiff to show cause why the order of Alderson, B., should not be set aside, upon payment into Court of the principal and interest for which the action was brought, and the defendant let in to try, upon terms, and why the proceedings should not in the mean time be stayed, or why all further proceedings should not be stayed until the fifth

day of the then next term]—a copy of which summons was, on the day last-mentioned, duly served, according to the practice of the said Court, upon the plaintiff ; that, after the service of the said summons, and before default had been made in payment according to the terms of the said order of Alderson, B., to wit, on December 14th, it was agreed between the plaintiff and the defendant that Parke, B., should make, and he did then, to wit, on the day last aforesaid, make, by consent of the plaintiff and the defendant, an order in the said cause [adjourning the summons of December 13th to the 17th]—a copy of which last-mentioned order was, before any default had been made in payment as aforesaid, to wit, on, etc., duly served on the plaintiff, according to the practice of the said Court ; that afterward, to wit, on December 17th, the subject-matter of the last-mentioned summons was heard at chambers by Rolfe, B., and thereupon afterward, to wit, on December 18th, Rolfe, B., did make an order in the said cause as follows—that is to say : “ Wade v. Simeon. Upon hearing counsel on both sides, and upon reading the several affidavits, etc., I do order, that, upon the defendant's undertaking to pay to the plaintiff interest on the sum of £2400 from the 14th inst., at £5 per cent, if the plaintiff shall eventually become entitled to that sum, and provided the defendant pays into Court £2500 on or before the 23d instant, all further proceedings in this cause shall be stayed till the fourth day of next term. I further order, that, if such money is not so paid, the summons dated December 13th instant, be dismissed with costs, to be taxed by the master, and paid by the defendant to the plaintiff, his attorney or agent. Dated, etc.”—a copy of which last-mentioned order was, on the day last aforesaid, served on the plaintiff according to the practice of the said Court, and the defendant, on the same day, did undertake to pay interest to the plaintiff according to the said order ; of which several premises the plaintiff on the day aforesaid had notice ; that, on December 21st, the defendant did duly pay into the said Court £2500, according to the last-mentioned order ; that, afterward, to wit, on the fourth day of the term next following the last-mentioned order, to wit, on, etc., the said Court of Exchequer made a rule in the said cause, which rule was and is as follows—that is to say [setting out a rule calling upon the plaintiff to show cause why the order of Alderson, B., of December 6th, should not be set aside, upon such terms as the Court should direct]—a copy of which rule afterward, to wit, on the day last aforesaid, was duly served on the plaintiff ; which rule was returned to show cause before the commencement of this suit ; that afterward, to wit, on Jan-

uary 27th, 1845, to wit, before the commencement of this suit the said rule came on to be heard before the said Court of Exchequer, etc., whereupon the said Court made a rule—being the rule in the said count mentioned—that the order of Alderson, B., made in this cause on December 6th then last, should be set aside; that the plaintiff should proceed to the trial of this cause, and, in the event of his obtaining a verdict, that he should be at liberty to enter up judgment thereon as of the time he would have been entitled to enter up the same under the said order, had not the same been thereby set aside; that the money paid into Court by the defendant, on December 21st, 1844, should remain therein to abide the event of the trial; that, in case the plaintiff should ultimately be entitled to recover and receive the same, he should be entitled to charge the defendant with interest at 5 per cent from the time it was so paid in; and that the defendant should pay to the plaintiff the costs of that rule, and of the said order, and of, and incidental to, restoring the cause to the position in which it stood at the time of the date thereof—a copy of which rule was, to wit, on the day last aforesaid, duly served on the plaintiff according to the practice of the said Court; that the costs provided by the last-mentioned rule to be paid by the defendant to the plaintiff were afterward, to wit, on the day last aforesaid, taxed by one of the masters at £62 12s. 6d., and were afterward, to wit, on the day last aforesaid, paid by the defendant to, and received by the plaintiff; that the said cause was still depending in the said Court, and that the plaintiff, of his own default, had never proceeded to the trial thereof pursuant to the terms of the last-mentioned rule—verification.

Special demurrer to the fourth plea, assigning for causes, that it does not confess and avoid, or traverse, or deny, any of the matters in the first count alleged; that the matter pleaded affords no defence to the cause of action in that count mentioned; that the plea sets up as a defence immaterial matter; that the plea does not allege or show that the defendant, before or at the time of the making of the promise, was not aware that the plaintiff had no cause for the said action, nor does it allege or show that the plaintiff concealed anything from the defendant; that it is ambiguous and uncertain what is meant by the allegation in the plea that the plaintiff never had any cause of action against the defendant in respect of the subject-matter of the said action; that the plea does not exclude all other consideration for the promise in the said count mentioned; that it is ambiguous, and uncertain from the plea, what is the real defence the defendant intends setting

up thereby ; and that the plea should have concluded to the country.

Special demurrer to the seventh plea, assigning for causes, that it does not confess and avoid, or traverse, or deny, the promises in the declaration mentioned ; that the plea is insufficient, as being an argumentative traverse and denial of the defendant's having made the promises mentioned in the declaration ; that it is insufficient as amounting to a plea of *non assumpsit* to the first count ; that it is insufficient as amounting to a plea of *non assumpsit* to the last count ; that the plea should have concluded to the country ; that the plea professes to answer the whole of the promise in the first count, but only answers part of such promise ; that it is not possible that such promises as those in the declaration alleged could be deduced and implied from the facts in the plea alleged ; that the plea is bad for duplicity, in first denying the promises to have been made as alleged in the declaration, and afterward stating that they were rescinded ; that it is ambiguous, and uncertain, from the introductory part of the plea, whether the same is pleaded to the whole of the declaration, or only to the first count ; that, if the same be taken as pleaded to the first count, the same is insufficient as attempting afterward to answer the cause of action in the last count mentioned ; that it is insufficient as showing that the Court of Exchequer, without any power, authority, or jurisdiction whatsoever, and without any consent on the plaintiff's part, revoked and rescinded the promises in the declaration mentioned ; and that, though it may confess the promises to have been made, it does not show anything to avoid, discharge, release, or satisfy the causes of action in the declaration mentioned.

The defendant joined in demurrer.

Channell in support of the demurrers.

Kinglake (with whom was *Barstow*), *contra*.

TINDAL, C.J. The only question now remaining is upon the demurrer to the fourth plea. I am of opinion that the fourth plea is a good and valid plea, on general demurrer. The declaration alleges that the plaintiff had commenced an action against the defendant in the Exchequer, to recover two sums of £1300 and £700 respectively, which action was about to be tried, and that, in consideration that the plaintiff would forbear proceeding in that action, until December 14th then next, the defendant promised the plaintiff that he would on that day pay the money, with interest and costs ; that the plaintiff, confiding in the defendant's promise, forbore prosecuting the action, and stayed the proceedings until the day named ; but that the defendant did

not pay the money or the costs. The fourth plea states that the plaintiff never had any cause of action against the defendant in respect of the subject-matter of the action in the Court of Exchequer, which he, the plaintiff, at the time of the commencement of the said action, and thence until the time of the making the promise in the first count mentioned, well knew. By demurring to that plea, the plaintiff admits that he had no cause of action against the defendant in the action therein mentioned, and that he knew it. It appears to me, therefore, that he is estopped from saying that there was any valid consideration for the defendant's promise. It is almost *contra bonos mores*, and certainly contrary to all the principles of natural justice, that a man should institute proceedings against another, when he is conscious that he has no good cause of action. In order to constitute a binding promise, the plaintiff must show a good consideration, something beneficial to the defendant, or detrimental to the plaintiff. Detrimental to the plaintiff it cannot be, if he has no cause of action ; and beneficial to the defendant it cannot be ; for, in contemplation of law, the defence upon such an admitted state of facts *must* be successful, and the defendant will recover costs, which must be assumed to be a full compensation for all the legal damage he may sustain. The consideration, therefore, altogether fails. On the part of the plaintiff it has been urged, that the cases cited for the defendant were not cases where actions had already been brought, but only cases of promises to forbear *commencing* proceedings. I must, however, confess that, if that were so, I do not see that it would make any substantial difference. The older cases, and some of the modern ones, too, do not afford any countenance to that distinction. In *Tooley v. Windham*, Cro. Eliz. 206, it is stated that the plaintiff had purchased a writ out of Chancery against the defendant, to the intent to exhibit a bill against him ; upon the return of the writ, which was for the profits of certain lands, which the father of the defendant had taken in his lifetime, the defendant, in consideration he would surcease his suit, promised to him that, if he could prove that his father had taken the profits, or had the possession of the land under the title of the father of the plaintiff, he would pay him for the profits of the land ; and the Court held that the promise was without consideration and void. There the suit was in existence at the time of the making of the promise. So in *Atkinson v. Settree*, Willes, 482, an action had been commenced at the time the promise was made. These cases seem to me to establish the principle upon which our present judgment rests ; and I am not aware that it is at all opposed by *Longridge v. Dorville*. It

may be that the peculiar circumstances of that case took it out of the general rule. The ship was under detention by virtue of process from the Admiralty Court : the event of the suit in that Court was uncertain ; neither party could foresee the result ; and therefore the relinquishment by the plaintiff of his hold upon the ship might well be a good consideration for the promise declared on. Here, however, there was no uncertainty ; the defendant asserts, and the plaintiff admits, that there never was any cause of action in the original suit and that the plaintiff knew it. I therefore think the fourth plea affords a very good answer, and that the defendant is entitled to judgment thereon.

MAULE, J. I also am of opinion that the defendant is entitled to judgment on the fourth plea, though I think it extremely questionable whether that plea is not open to objection provided it were rightly taken. Forbearance to prosecute a suit in which the plaintiff has no cause of action (and in which, as the Lord Chief Justice properly adds, he must eventually fail), according to the authorities, is no consideration. It is no benefit to the defendant, and no detriment to the plaintiff. Costs are considered by the law a sufficient indemnification for a defendant who is sued, where there exists no cause of action, consequently the defendant in contemplation of law derives no benefit from a stay of the proceedings. In *Smith v. Monteith* it seems to have been considered that the allegation in the plea—that the plaintiff had not any claim or demand or cause of action against the original defendant, in respect whereof the plaintiff was entitled to recover the sum which the defendant promised to pay—did not sufficiently show that the plaintiff must necessarily have failed in the original action ; and it may be doubted whether the fourth plea here does sufficiently show that there was no consideration for the defendant's promise, by reason of the plaintiff having no cause of action in the former suit, and that, therefore, he must necessarily have failed in that suit. That objection would, I think, have shown the fourth plea pleaded in this case, to be bad, provided the objection had been properly pointed out as a cause of demurrer. But, on general demurrer, I think the plea must be taken *impliedly* to allege that the plaintiff must necessarily have failed, and is, therefore, sufficient, the absence of a *direct* allegation to that effect being only ground of special demurrer. It has been contended that this objection *is* specially pointed out by that part of the demurrer which objects to the plea on the ground that it is *ambiguous*. That, however, is not, in my opinion, a sufficient assignment of this cause of demurrer within the statute. Though I feel bound to state my opinion, I confess I should

not be much surprised if a court of error should come to a different conclusion upon the doubt suggested.

CRESSWELL, J. The declaration in this case is founded upon a promise by the defendant to pay certain moneys in consideration of the plaintiff's forbearing to proceed with an action pending in the Court of Exchequer. The answer set up by the fourth plea is, that the plaintiff never had any cause of action against the defendant in respect of the subject-matter of that suit, which the plaintiff well knew. It has been surmised, in the course of the argument, that there is a distinction between abstaining from *commencing* an action and forbearing to prosecute one *already commenced*. In the older cases I find no such distinction. Lord Coke lays it down broadly that the staying of an action that has been unjustly brought is no consideration for a promise to pay money. I cannot help thinking, on general principles, that the staying proceedings in an action brought without any cause is no good consideration for a promise such as is relied on here. The plea, in plain terms, avers that the plaintiff never had any cause of action, and that he well knew it. Are we to assume that the defendant might, by some slip in pleading, have failed in his defence to that action, if it had proceeded? I think not. On general demurrer the plea appears to me to be sufficient, and none of the causes of demurrer specially assigned, in my judgment, hits the point made by my Brother Channell.

ERLE, J. It appears to me also that the fourth plea is sufficient. The declaration states that the plaintiff had commenced an action against the defendant in the Court of Exchequer to recover certain moneys, that the defendant had pleaded various pleas on which issues in fact had been joined, which were about to be tried, and that, in consideration that the plaintiff would forbear proceeding in that action until a certain day the defendant promised to pay. The issues joined on that record, therefore, were perfectly well known and ascertained. The defendant pleads that the plaintiff never had any cause of action against him in respect of the subject-matter of the action in the Exchequer, which he the plaintiff, at the time of the commencement of the action, and thence until the time of the promise well knew. I think the plea must be read as importing a distinct allegation, that, upon the issues joined in that action, whether of fact or of law, the plaintiff must have failed. Construing the plea in this way, I think it is a good plea, at least on general demurrer, and that the defendant is entitled to judgment thereon.

Judgment for the defendant on the fourth plea, and for the plaintiff on the seventh plea.

MARIA OLDERSHAW AND ROBERT MUSKET, EXECUTRIX AND EXECUTOR OF ROBERT OLDERSHAW *v.*
WILLIAM THOMAS KING.

IN THE EXCHEQUER, MAY 23, 1857.

IN THE EXCHEQUER CHAMBER, JUNE 22, 23, 1857.

[*Reported in 2 Hurlstone & Norman* 399, 517.]

THIS was a special case stated for the opinion of the Court.

The action was brought by the plaintiffs, as executrix and executor of Robert Oldershaw, to recover the sum of £731 9s. 3d. upon the defendant's guarantee.

In August, 1848, John and Joseph Francis King being indebted to the testator, Robert Oldershaw, who was their attorney, in a considerable sum of money, applied to him for further advances, which he declined to make unless he had the defendant's guarantee. The defendant, after some correspondence and two interviews with the testator, R. Oldershaw, signed the following memorandum :

“ 21 MANCHESTER TERRACE, August 24, 1848.

“ DEAR SIR : I am aware that my uncles, J. and J. F. King, stand considerably indebted to you for professional business, and for cash lent and advanced to them, and that it is not in their power to pay you at present; and as in all probability they will become still further indebted to you, though I by no means intend that this letter shall create or imply any obligation on your part to increase your claim against them, I am willing to bear you harmless against any loss arising out of the past or future transactions between you and my said uncles to a certain extent, and therefore in consideration of your forbearing to press them for the immediate payment of the debt now due to you, I hereby engage and agree to guaranty you the payment of any sum they may be indebted to you upon the balance of accounts between you at any time during the next six years, to the extent of £1000, whenever called upon by you to pay the same, and after twelve calendar months' previous notice.

“ I remain, etc.,

“ WILLIAM THOMAS KING.”

“ To Robert Oldershaw, Esq.”

The above guarantee was handed to the testator, Robert Oldershaw, on August 25th, 1848, on which day he advanced to

John and Joseph Francis King £170. Previously thereto he had advanced to them £513 in money. After August 25th, 1848, he paid to John and Joseph Francis King various sums, amounting in the whole to £520. The transactions went on till July 10th, 1849, when John and Joseph Francis King became bankrupts. At the date of the *fiat* there was due from the said John and J. F. King to the testator, Robert Oldershaw, £2184 16s. 4d.

After the realization of the securities in the hands of the testator, and the receipt of a dividend under the estate of John and J. F. King, there remained due to the plaintiffs, as executrix and executor of the said Robert Oldershaw, who died in May, 1851, the sum of £731 9s. 3d.; and on June 6th, 1854, the plaintiffs gave notice to the defendant that the said sum of £731 9s. 3d. was due and owing, and requested him, under the terms of his guarantee, to pay the amount of the same to them.

It is agreed between the parties that all things necessary to be done, and all conditions precedent, have been performed and fulfilled, and all times have elapsed necessary to enable the plaintiff to recover the said sum of £731 9s. 3d., provided the Court shall be of opinion that the defendant, under the said memorandum and facts above stated, is liable to pay the same.

The questions for the opinion of the Court are: First, whether, on the above facts, the defendant is liable or not; and, secondly, to what extent.

Knowles (with whom was *W. M. Cooke*) for the plaintiff.

Petersdorff for the defendant.

The Court having differed in opinion, the following judgments were now delivered.

BRAMWELL, B. My Brother Watson and myself are of opinion that the defendant is entitled to judgment. The consideration mentioned for the defendant's promise is forbearing to press for the immediate payment of the debt now due; and this in our judgment is void for uncertainty. The authorities which have been referred to show that a guarantee in consideration of forbearance "for some time," or "a little time," is void. In the present case, the word is "immediate." That cannot mean "instantaneous," and anything beyond is uncertain. It was argued that, no time being named, it was to be taken to be, that a reasonable time was intended. That is not so, as it is to "forbear to press for immediate payment;" not forbear for a reasonable time. However, assuming it were so, that is equally vague and uncertain. In the result one may be able to say in each particular case if the creditor has waited a reasonable time; but it is impossible to lay down a rule as to what

does or does not constitute such a time between a debtor and creditor; and accordingly it was so held in *Semple v. Pink*, 1 Exch. 74, where the reasoning of Alderson, B., and the remark of Rolfe, B., are to the effect that such a guarantee, as stated in the declaration in that case, is void for uncertainty. Then, whether this consideration be read to be to forbear for a reasonable time, or to forbear to press for immediate payment, it is void. *Mapes v. Sidney, Cro. Jac.* 683, will not help the plaintiff on either ground of its decision, for here the agreement to forbear is not absolute, nor is Lord Hobart's reason applicable, as the consideration for the agreement must now be in writing.

But it was said that the guarantee contemplated the possibility of future advances, and that as a guarantee saying, "I will pay anything you advance to A," without saying why, would be good; and as it appears by *Wood v. Benson*, 2 C. & J. 94, that a guarantee may be good for a future, and bad for a past, debt, so may this guarantee be good for the future, though not for the past debt. But we are of opinion that as the consideration expressly mentioned is forbearance, the promise cannot (as in the case cited) be referred to what otherwise no doubt might, by necessary implication, be taken to be the consideration. It is clear that if the guarantee had been "in consideration you will forbear for a month," that would be at least a part of the consideration, and performance of it would have had to be averred, as of a condition precedent; and it is not the less so here because the consideration is void for uncertainty. Again, the agreement is to pay the sum due "on balance of accounts," so that the defendant was to be liable for nothing other than a sum in which the old debt was taken into account.

We are of opinion, therefore, that the plaintiffs are not entitled to recover, and we cannot help adding, that though we doubt not that the intention of the testator was perfectly fair, as indeed is shown by the indulgence he gave, and that he desired not to tie himself up, only because of the loss which might thereby accrue, still that he did endeavor to get a binding promise without giving any consideration for it, and in reality fails in consequence. What the defendant substantially bargained for was forbearance to the principal debtor, and to this he never had a right, though it was granted in fact.

POLLOCK, C.B. I regret very much that I am compelled to differ from the rest of the Court, but it appears to me that the plaintiff is entitled to our judgment, and this whether we look at the authorities on the subject or at the reasonable construction which is to be put on the letter of guarantee with reference

to the whole matter to which it relates. (His Lordship then read the guarantee.) I think a mercantile instrument such as this is ought not to be read and construed with the strictness with which a declaration or plea might be. We ought (in my judgment) to see whether the parties have so expressed themselves as to show that there was a guarantee, and for what, and upon what consideration. By the Statute of Frauds such an undertaking must be in writing, and I do not intend to question the case of *Wain v. Warlters*, 5 East, 10, that the consideration for the promise must appear as well as the promise itself, but, as there is in reality a consideration in this contract which is not expressed, it appears to me that effect ought to be given to it, so that the agreement between the parties should be carried into effect. The defendant undoubtedly intended to promise something, and for a consideration. On the faith of that promise the plaintiff has advanced money and given credit, and I think, unless we are compelled by reason or authority to decide against the plaintiff, we ought to give effect to what undoubtedly was intended between the parties. It is said that a consideration being expressed, we must take what is expressed to be the real, true, and only consideration, and that we cannot notice any other that is not expressed. I do not feel the force of that remark, and the rather because the consideration expressed is said to be no consideration at all; had there been no consideration expressed at all, it is clear from several cases (which it is unnecessary to cite) that the advance of money and the incurring of a further debt would (though not expressed) have been a good consideration for the promise to pay the debt arising out of such future transactions. I cannot see the good sense or the justice of at the same time deciding that the consideration stated is no consideration, and therefore will not support the promise, and yet it is sufficient to prevent us from looking at the agreement and seeing that it contains a real, substantial, and good consideration, upon which the promise (at least as far as future transactions are concerned) may be enforced. It seems to me not to be good law, or logic, to say that it is a consideration and that it is no consideration, and this to defeat the real and honest intention of the parties (of one of them at least); and it seems to me we ought to construe the agreement *ut res magis valeat quam pereat*; and if what is stated to be the consideration is no consideration at all, we ought to see whether there is not another consideration which will render the agreement sensible and available *quoad* future dealings (at least). In the case of *Johnston v. Nicholls*, 1 C. B. 251,¹ the

¹ E. C. L. R. Vol. L.

guarantee was in these words : " As you are now about to enter upon transactions in business with C, with whom you have already had dealings, in the course of which C may from time to time become largely indebted to you ; in consideration of your doing so I hereby agree to be responsible to you for, and guaranty to you the payment of, any sums of money which C now is, or may at any time be indebted to you, so that I am not called upon to pay more than the sum of £2000." There the only consideration expressed was entering upon transactions, not saying for how long ; here the consideration expressed is forbearing to press for immediate payment. In the case cited Maule, J., held the consideration to mean substantially that the plaintiffs would continue the dealings ; so here forbearing to press for immediate payment really means allowing the account to go on, or allowing the dealings to continue, and the Court held that the consideration was sufficient to support a promise to pay the past debt, as well as any future debt to be incurred. Cresswell, J., took the same view of the consideration, which he held to be continuing to have dealings, in which Erle, J., concurred. (See also the case of Russell and Another *v.* Moseley, 3 B. & B. 211.¹)

With respect to so much of the consideration as arose out of future advances and dealings, I am of opinion that what is necessarily implied from the writing is to be dealt with as if it was actually there expressed in words at length ; the implication is not one of law, it is one of fact. It is a necessary implication of fact arising out of the transaction and the language used respecting it. Where the law would imply a contract, that shall not prevail against an express contract ; but it is not implied by law that the future advances, if made, shall be the consideration for a promise to pay them by a third person. It is implied as a necessary conclusion, not of law, but of fact, that that is what the parties meant, and that it is so clear, manifest, and obvious that there is no occasion to express it. I think, therefore, the document is to be read thus—as to past debts, in consideration of your forbearing to press for immediate payment, and as to future dealings, in consideration of your continuing these dealings and making advances, if you shall make them, which you are not bound to do, I hereby undertake, etc. ; or else—as to past debts and future advances, in consideration of your forbearing to press for immediate payment, and allowing the account to go on, I undertake to pay the balance, consisting of either, not exceeding £1000. Suppose a guarantee were in these words—" I undertake without any consideration

¹ E. C. L. R. Vol. L. 7.

to pay for any goods you may supply to J. S. from the date of this"—and the goods were furnished to J. S., could it be successfully contended that the party giving the promise would not be bound to pay for them on the ground of there being no consideration? I am of opinion in the negative, and "without any consideration" would be construed to mean without any other consideration than what arises out of the transaction itself.

I am, therefore, without any doubt, of opinion, that effect ought to be given to this guarantee in respect of the advances made and the debts contracted since the date of the guarantee, and I incline to think that effect ought to be given to it as to the whole claim, but as the majority of the Court is of a different opinion the judgment must be for the defendant.

Judgment for the defendant.

ERROR on the judgment of the Court of Exchequer on a special case. The case and judgment of the Court below are reported, *ante*, p. .

Montague Smith (with whom was *W. M. Cooke*) for the plaintiffs.

Petersdorff (with whom was *J. P. Norman*) for the defendant.

COCKBURN, C.J., now said. I am of opinion that the judgment of the Court below must be reversed. The question arises on a contract of guarantee. (His Lordship read the defendant's letter.) It was contended in the Court below and before us, that looking at the language of this document, it must be taken that the contract was based entirely on the consideration that Oldershaw would forbear to press for the immediate payment of the debt due to him at the time this letter was written; and it was said that the consideration was insufficient, an agreement to forbear to press for immediate payment being too vague to constitute the consideration for a promise; and several authorities were cited in support of that position, and particularly the case of *Semple v. Pink*, 1 Exch. 74. We think, however, that this is not the true construction of the contract. I agree with what was said by the Lord Chief Baron in the Court below, that we must not construe this document with the strictness with which we should construe a pleading, but must look to the whole of the instrument in order to see what was the real meaning of the parties. Thus, though the words of promise on the part of the defendant follow immediately after the words "in consideration of your forbearing to press them for the immediate payment of the debt now due," we need not construe the words as we should the statement of a contract in a declara-

tion. It stands thus, the defendant says, John and Joseph Francis King, being indebted to you for professional business, and cash lent and advances, and you having the right to close the account and insist on immediate payment, if, instead of doing so, you will leave the account open, and make further advances, although I do not ask you to bind yourself to do so, still, if you do so, I will be responsible to you to the extent of £1000. The consideration is not simply the forbearing to press for immediate payment, but also the future advances, which, though not stipulated for, were contemplated by the parties. But supposing that the sole consideration was the forbearing to press for immediate payment, I should not be prepared to assent to the doctrine laid down in *Semple v. Pink*. These are authorities for saying that an agreement to forbear for a short time, or a little time, is too indefinite to constitute a consideration for a contract; but I am not at all prepared to assent to the proposition that an agreement to forbear for a reasonable time would not be sufficient. I see no reason why the question as to what is a reasonable time should not be considered and determined with reference to the circumstances of the case by a jury. As, however, in the view I take of this case, the contract discloses a sufficient consideration independently of such forbearance, it is not necessary to go the length of overruling *Semple v. Pink*.

ERLE, J. I concur in the opinion expressed by the Lord Chief Baron in the Court below, and the Lord Chief Justice in this Court, and therefore I think that the judgment of the majority of the Court below ought to be reversed. The first question is upon the construction of the document, whether it is a contract in consideration of time being given by the creditor to the debtor, or a contract in consideration of time being so given, and further advances to be made? Looking at the whole letter, and the circumstances under which it was written, and considering the importance of further advances, I come to the conclusion that the consideration contemplated was, that further advance should be made, and time given by the creditor before he would press for the payment of the existing debt. Though the contract did not bind the creditor to make further advances, or to give time unless he chose to do so, it is clear that if he did make the advances and did give time, that which was contingent at the time when the instrument was written became an absolute and binding contract. I am also of opinion, that although the amount of further advances, and of the time to be given is not defined, still, if time is given and advances are made, it is enough. These undefined terms ought

to receive a construction in reference to the facts given in evidence *ut res magis valeat quam pereat*. If the guarantor has had the advantage he bargained for, we must hold him to his promise. That suffices for the judgment of reversal in the present case. I concur with the Lord Chief Justice with respect to the case of *Semple v. Pink*, 1 Exch. 74. I do not assent to the doctrine that a guarantee in consideration of an agreement to give time is void unless the time to be given is defined in the contract. But it is not necessary to decide that point.

WILLIAMS, J. I am of the same opinion. I think that the case involves no question of law at all. It merely turns on the construction of the guarantee. In my opinion, the true meaning of the instrument is, that the defendant contracted with Oldershaw that if, without pressing for immediate payment, he would continue his transactions uninterruptedly with the defendant's uncle, that the defendant would guaranty the payment of the balance of their account at any time within six years, to the extent of £1000. If that was the true construction of the agreement, then the holding it valid is in accordance with all the authorities cited in the argument.

CROMPTON, J. I do not disagree with the result of the judgments which have been delivered, but I am bound to say that I differ from the rest of the Court as to the construction of this contract. I think the view taken of the meaning of the parties by my Brother Bramwell in his judgment is the correct one. I agree that we must see what is the promise and what is the consideration upon which it is founded, and that to ascertain this, we may look at all the facts of the case. And I quite agree with the doctrine established in the case of *Johnston v. Nicholls*, 1 C. B. 251,¹ that where there is a consideration, that is sufficient to support a promise to guaranty either past or future debts. My Brother Maule puts the case on the true ground—viz., that the substance of such a contract as the present is, that in consideration that the plaintiffs will do something in future, the defendants promise, in like manner, to do something in future. Here, supposing that the consideration is good, it is clear it would support a promise to pay the balance, whether arising from new or old debts. Then what is the consideration? The answer to that question does not depend on any technical rule, but on a consideration of the whole document as a mercantile instrument, treating that which the parties have expressed in words as that which they really intended to express. I think the meaning is, if you forbear to press for the immediate payment of the old debt, I will agree to guaranty the balance,

¹ E. C. L. R. Vol. L.

whether it remain the same or whether it is added to. There are not two promises. It is one promise to pay the balance, whether arising from fresh dealings or from the former dealings. It is said to be part of the understanding that there should be fresh dealings; but I think that is not so, and that the parties meant the promise to apply, whether there were fresh dealings or not. To construe the document otherwise seems to me to be putting a meaning upon it different from that which the parties intended. Oldershaw is not to engage himself to make further advances, and it is clear to my mind that the defendant engaged to pay, if Oldershaw gave time; and, on the other hand, if Oldershaw did not give time, that no action could have been maintained on this guarantee, notwithstanding that he made fresh advances. Therefore, it seems to me that the parties did not intend it to be, and we should be altering the contract if we make it a part of the consideration for the promise that there should be any fresh dealings. The consideration was that Oldershaw should not press for immediate payment, and I think that the giving a reasonable time is a sufficient consideration. In the old authorities mentioned in Comyn, it is said to be sufficient if there is an agreement for forbearance for a definite portion of time, or for a reasonable time; and in *Payne v. Wilson*, 7 B. & C. 423,¹ Lord Tenterden rests his judgment on the ground that it must be taken that the plaintiff had suspended proceedings for "a definite or reasonable time." I do not see any great difficulty in saying that what is a reasonable time may be determined at *nisi prius*. It may be difficult to say what a reasonable time is, but the difficulty is not greater than in many other cases where there is a promise to do a thing in a reasonable time. And the only distinct authority against that is the case of *Semple v. Pink*. The Court, however, in that case had really to decide whether there was a variance between the guarantee proved and that set out in the declaration. If I had to decide that case now, I should be inclined to say that a reasonable time might be implied, because no time was mentioned in the contract. That was the point before the Court.

WILLES, J. I am of the same opinion. Assuming that we are only to look to the words of the document and to see what is there stated as the consideration for the contract without regard to the previous recital; the consideration would appear to be "forbearing to press for the immediate payment of the debt due." There are many authorities which show that in cases like the present the word "immediate" may be construed

¹ E. C. L. R. Vol. L. 14.

to mean within a reasonable time to do the act in question. Accordingly, I think, that forbearing to press for immediate payment means forbearance for a reasonable time. Then it is said that that is not a sufficient consideration, because of the indefiniteness of the word "reasonable;" and because it might be competent to the person who enters into a contract, engaging to forbear for a reasonable time, to sue the next instant, or within a very short time. Looking for a moment to the mode in which the question of reasonable or unreasonable time would be determined, the difficulty vanishes. The question whether the creditor had forbore for a reasonable time or not would be determined by the jury. Now, suppose the consideration expressed had been forbearing for such a time as a jury who might try the question should consider reasonable, there can be no doubt but that it would be a perfectly good contract, and for a good consideration. That is what is tacitly expressed in this instrument. There are many cases in which the reasonableness of the time in which to do a thing, not being fixed by legal decisions, as in the case of the dishonor of a bill of exchange, it is left to the jury as a question of fact with reference to the circumstances of the particular case. I do not see on what principle an agreement to forbear for a time stipulated for by the parties should not constitute a good consideration. There are authorities to that effect. *Com. Dig., Action on the Case on Assumpsit (B) (B 1)*. In *Payne v. Wilson*, 7 B. & C. 423, Lord Tenterden seems to treat it as clear, that the forbearance for a reasonable time would be a sufficient consideration. No doubt there are authorities on the other side, but if we are to choose between authorities, one class of which tends to defeat, and the other class to uphold the intention of the parties, I should have no difficulty in adhering to the latter class. The construction put upon this instrument by my Brother Crompton was that which first suggested itself to my mind; but I think that it is not likely that the parties, in the relation in which they stood to each other at the time the guarantee was given, looked to forbearance alone as the consideration. There is a recital which shows that it was expected that the dealings would continue between Oldershaw and J. and J. F. King. I find by the subsequent part of the instrument, that it was supposed that they might continue during six years; and then there is the suggestion that "in all probability they will become still more indebted," evidently expressing a desire that the advances should be continued, not binding the creditor to make advances, but to induce him to make them. Probably, therefore, the most just construction of the instrument is that which has been

put upon it by my Lord Chief Justice and my Brothers Erle and Williams. But in either view of the case the plaintiffs are entitled to recover, and the judgment of the Court below ought to be reversed and judgment given for the plaintiffs, both as to past and future advances.

Judgment reversed.

THE ALLIANCE BANK (LIMITED) *v.* BROOM.

IN CHANCERY, NOVEMBER 14, 21, 1864.

[*Reported in 2 Drewry & Smale 285.*]

THIS case came on upon a demurrer.

It appeared, from the bill, that in June, 1864, the Alliance Bank opened a loan account with the defendants, who are merchants at Liverpool, and that such loan account was continued down to September 19th, 1864, when there was a balance due from the defendants to the bank on such loan account to the amount of £22,205 15s. 1d.

On September 19th, 1864, the plaintiffs requested the defendants, Messrs. Broom, to give them some security for the amount so due, and the defendants, who stated that they were entitled to certain goods, wrote to the manager of the bank the following letter :

“ LIVERPOOL, September 19th, 1864.

“ DEAR SIR : We hand you the following particulars of produce, which we propose to hypothecate against our loan account, and at the same time undertake to pay the proceeds as we receive them, to the credit of the said account.”

The letter then contained a list of goods and their values, and was signed by Messrs. Broom.

In pursuance of this letter the plaintiffs, on September 20th, 1864, applied to the defendants for the warrants for delivery of the goods mentioned in the letter, and the defendants promised to deliver the warrants to the plaintiffs as soon as they could obtain them from the warehouses.

The bill stated that the defendants refused to deliver the warrants, or other documents relating to the goods, to the plaintiffs, and threatened and intended to deliver them to other persons ; and the bill charged that the plaintiffs were entitled to a lien or charge upon the goods mentioned in the letter by virtue of the agreement, and prayed for a declaration to that effect. The bill also prayed that the defendants might be or-

dered to deliver to the plaintiffs the warrants and other documents relating to the title of said goods, and cause the said goods to be delivered to the plaintiffs, by way of security for the amount due to them on the loan account. The bill also prayed an injunction to restrain the defendants from dealing with the warrants or goods in the mean time.

To this bill the defendants filed a demurrer, on the ground that the agreement contained in the letter was without consideration ; and therefore one which the Court would not enforce.

Daniel and J. N. Higgins for the defendants.

Bevir for the plaintiffs.

The VICE-CHANCELLOR reserved judgment.

The VICE-CHANCELLOR (after stating the facts, said) :

The defendant demurs to the plaintiff's bill in this case, on the ground that the promise to give security, which the plaintiff seeks to enforce, was without any consideration—that it is, in fact, a *nudum pactum*, which the Court will not enforce ; and in support of this proposition it is argued that the plaintiffs, so far from giving any consideration for the promise, could at any time have brought an action for the payment of the debt ; and that they could have done so perfectly true.

Now, according to the facts stated in the bill, a demand was made by the creditor for security ; and upon that demand a promise and agreement was made by the debtor that he would give such security ; and that, although it might take some time to get the warrants, he would hand them over to the creditor when he obtained them.

It appears to me, that when the plaintiffs demanded payment of their debt, and, in consequence of that application, the defendant agreed to give certain security, although there was no promise on the part of the plaintiffs to abstain for any certain time from suing for the debt, the effect was, that the plaintiffs did, in effect, give, and the defendant received, the benefit of some degree of forbearance ; not, indeed, for any definite time, but, at all events, some extent of forbearance. If, on the application for security being made, the defendant had refused to give any security at all, the consequence certainly would have been that the creditor would have demanded payment of the debt, and have taken steps to enforce it. It is very true that, at any time after the promise, the creditor might have insisted on payment of his debt, and have brought an action ; but the circumstances necessarily involve the benefit to the debtor of a certain amount of forbearance, which he would not have derived if he had not made the agreement.

On this ground the demurrer must be overruled.

COOK AND OTHERS *v.* WRIGHT.

IN THE QUEEN'S BENCH, JULY 9, 1861.

[*Reported in 1 Best & Smith 559.*]

DECLARATION by the plaintiffs, as payees, against the defendant, as maker of two promissory notes, dated February 7th, 1856. The first count was upon a note for £10 10s., payable twelve months after date ; the second was upon a note for £11, payable twenty-four months after date. There was also a count upon an account stated. Claim £50.¹

First plea, to the whole declaration : That, after the passing and coming into operation of the Whitechapel Improvement Act, 1853, and after the passing and coming into operation of the Metropolis Local Management Act, 1855, the defendant made the several promissory notes in the said first and second counts mentioned, at the request of the plaintiffs, and that, at the time of making the said promissory notes, the plaintiffs asserted and represented to the defendant, and the defendant believed such assertion and representation to be true, that there was then due and owing, and payable from him, the defendant, as the owner of certain lands and buildings in certain streets called Finch Street, John Street, and Dowson's Place, situate within the parish of St. Mary, Whitechapel, to the trustees of the parish of St. Mary, Whitechapel, under the provisions of the Whitechapel Improvement Act, 1853, divers large sums of money in respect of paving the streets fronting, adjoining, and abutting on such lands and buildings. And the defendant says that, at the time of making the said promissory notes no sum of money whatsoever was due or owing or payable from the defendant as such owner to the said trustees, nor was the defendant such owner as aforesaid, and that there never was any consideration or value for the defendant making the said promissory notes in the first and second counts mentioned, or either of them, or for his paying the same, or any part thereof ; and the plaintiffs never were, nor was any person, ever a holder of the said notes, or either of them, for value or consideration ; and that the account stated, in the declaration mentioned, was stated of and concerning the matters and things in this plea mentioned, and not of or concerning any other matter or thing whatsoever.

¹ The suit was commenced in the Whitechapel County Court of Middlesex, and was removed by *certiorari* into this Court.

Second plea to the first and second counts : That the defendant was induced to make, and did make, the promissory notes in those counts mentioned, and each of them, by the fraud, covin, and misrepresentation of the plaintiffs and others in collusion with them.

On the trial, before Wightman, J., at the Sittings in London, during Easter Term, 1860, it appeared that the plaintiffs were four of the commissioners or trustees acting under and incorporated by § 27 of the Whitechapel Improvement Act, 1853, 16 & 17 Vict. ch. cxli.; and the action was brought to recover the amount of the two notes mentioned in the declaration. The evidence as to what took place at the time of the giving of the notes was as follows. Mitchell, the clerk to the trustees, said that certain parts of the district not being in repair in 1854, notices to do repairs were sent or left addressed to the owners; and in October, 1855, he wrote a letter to the defendant demanding £70 for expenses incurred by the trustees in doing paving works in front of houses, of which the defendant was the owner or occupier, situate in and abutting on public highways within the district of the Whitechapel Improvement Act.¹ The defendant complained that the works done by the trustees had seriously injured the property, and that the tenants were dissatisfied, and requested him to get an abatement made. He informed the defendant that the trustees assented, and the balance to be paid by the defendant was agreed to at £30; the defendant then requested time, and time was given, upon condition that he paid interest; and three promissory notes were

¹ Sect. 38 of Stat. 16 & 17 Vict. ch. cxli.: "That in case any present or future street, not being a highway repaired by any Board of Commissioners or Trustees, or any part thereof, be not from time to time levelled, paved, flagged, and channelled to the satisfaction of the said trustees, and in such manner and with such materials as they may direct, they may, by notice in writing to the respective owners or occupiers of the lands or buildings fronting, adjoining, or abutting upon such parts thereof as may require to be levelled, paved, flagged, or channelled, require them to level, pave, flag, or channel the same within a time to be specified in such notice; and if such notice be not complied with, the said trustees may, if they shall think fit, execute the works mentioned or referred to therein, and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective lands or buildings, and in such proportions as shall be settled by the trustees, having regard to all the circumstances of the case; and such expenses may be recovered from the last-mentioned owners as liquidated damages, or by action on the case, in any county Court or superior court of law, in the same manner as rates herein-after mentioned, and also in like manner as in and by the Towns Improvement Clauses Act [1847], herewith incorporated, is provided, with respect to the recovery of expenses in the clauses of the last mentioned act with respect to the execution of works by owners."

given by the defendant, the first of which was paid by him under protest. The defendant was called, and stated that Mrs. Bennett was owner of the three houses in question, and that he was tenant of one of them, at a rack rent under her, and collected the rents of the others for her ; that he paid the paving-rate of the house which he occupied, and the paving-rates of the other houses he paid for Mrs. Bennett and in her name ; that, upon receiving the notice of October, 1855, he went before the Board of Trustees and told them that he was not the owner of the property, and showed them Mrs. Bennett's receipts for the rent. They replied that, as he paid the rates, they considered he was the owner within the meaning of the Whitechapel Improvement Act, 1853, and, if he did not give notes, they would serve him as they have served Goble, which was by levying an execution on him ; that there was another case in which the question of the liability of the inhabitants was to be tried, and, if decided against the trustees, he should not be called on to pay. When the first note became due he complained to Mitchell that the trustees had not carried out their promise to try one of the cases. Mitchell said that, as the defendant had signed the notes, he must pay them, and that the promised trial should take place ; thereupon the defendant paid the first note. The defendant was afterward told by Mrs. Bennett that he was not the owner within the meaning of the act, and he thereupon went to a Board meeting of the trustees and told them that he would not pay the other notes. It was contended for the defendant that the notes were given without consideration, the defendant not being an "owner" within § 7 of the Whitechapel Improvement Act. The jury, in answer to questions put to them by the learned judge, found that the defendant told Mitchell or the Board, before he gave the notes, that he was not the owner ; that the defendant mentioned, before he gave the notes, that Mrs. Bennett was the owner ; and that Mitchell, or some member of the Board, told the defendant, in the Board-room, that unless he gave the notes he would be served as Goble had been. The verdict was thereupon entered for the defendant, leave being reserved to move to enter a verdict for the plaintiffs. In the same term (May 4).

Montagu Chambers obtained a rule to show cause accordingly, on the ground that the evidence did not prove want of consideration for giving the notes, and that, upon the evidence the plaintiffs were entitled to a verdict.

This rule was argued in this term, May 23d, before Cockburn, C.J., Wightman, Crompton, and Blackburn, JJ.

Shee and *Barnard* showed cause.

Hannen in support of the rule.

BLACKBURN, J., delivered the judgment of Cockburn, C.J., Wightman, J., and himself ; Crompton, J., having left the Court before the argument was concluded.

In this case it appeared on the trial that the defendant was agent for a Mrs. Bennett, who was non-resident owner of houses in a district subject to a local act. Works had been done in the adjoining street by the commissioners for executing the act, the expenses of which, under the provisions of their act, they charged on the owners of the adjoining houses. Notice had been given to the defendant, as if he had himself been owner of the houses, calling on him to pay the proportion chargeable in respect of them. He attended at a Board meeting of the commissioners, and objected both to the amount and nature of the charge, and also stated that he was not the owner of the houses, and that Mrs. Bennett was. He was told that if he did not pay he would be treated as one Goble had been. It appeared that Goble had refused to pay a sum charged against him as owner of some houses, and the commissioners had taken legal proceedings against him, and he had then submitted and paid with costs. In the result it was agreed between the commissioners and the defendant that the amount charged upon him should be reduced, and that time should be given to pay it in three instalments ; he gave three promissory notes for the three instalments ; the first was duly honored, the others were not, and were the subject of the present action. At the trial it appeared that the defendant was not in fact owner of the houses. As agent for the owner he was not personally liable under the act. In point of law, therefore, the commissioners were not entitled to claim the money from him ; but no case of deceit was alleged against them. It must be taken that the commissioners honestly believed that the defendant was personally liable, and really intended to take legal proceedings against him, as they had done against Goble. The defendant, according to his own evidence, never believed that he was liable in law, but signed the notes in order to avoid being sued as Goble was. Under these circumstances the substantial question reserved (irrespective of the form of the plea) was whether there was any consideration for the notes. We are of opinion that there was.

There is no doubt that a bill or note given in consideration of what is supposed to be a debt is without consideration if it appears that there was a mistake in fact as to the existence of the debt : *Bell v. Gardiner*, 4 M. & Gr. 11 (E. C. L. R. Vol. XLIII.) ; and, according to the cases of *Southall v. Rigg* and

Forman v. Wright, 11 C. B. 481 (E. C. L. R. Vol. LXXIII.), the law is the same if the bill or note is given in consequence of a mistake of law as to the existence of the debt. But here there was no mistake on the part of the defendant either of law or fact. What he did was not merely the making an erroneous account stated, or promising to pay a debt for which he mistakingly believed himself liable. It appeared on the evidence that he believed himself not to be liable, but he knew that the plaintiffs thought him liable, and would sue him if he did not pay, and in order to avoid the expense and trouble of legal proceedings against himself he agreed to a compromise; and the question is, whether a person who has given a note as a compromise of a claim honestly made on him, and which but for that compromise would have been at once brought to a legal decision, can resist the payment of the note on the ground that the original claim thus compromised might have been successfully resisted.

If the suit had been actually commenced, the point would have been concluded by authority. In *Longridge v. Dorville*, 5 B. & Ald. 117 (E. C. L. R., Vol. VII.), it was held that the compromise of a suit instituted to try a doubtful question of law was a sufficient consideration for a promise. In *Atlee v. Backhouse*, 3 M. & W. 633, where the plaintiff's goods had been seized by the excise, and he had afterward entered into an agreement with the Commissioners of Excise that all proceedings should be terminated, the goods delivered up to the plaintiff, and a sum of money paid by him to the commissioners, Parke, B., rests his judgment, page 650, on the ground that this agreement of compromise honestly made was for consideration and binding. In *Cooper v. Parker*, 15 Com. B. 822 (E. C. L. R., Vol. LXXX.), the Court of Exchequer Chamber held that the withdrawal of an untrue defence of infancy in a suit, with payment of costs, was a sufficient consideration for a promise to accept a smaller sum in satisfaction of a larger.

In these cases, however, litigation had been actually commenced; and it was argued before us that this made a difference in point of law, and that though, where a plaintiff has actually issued a writ against a defendant, a compromise honestly made is binding, yet the same compromise, if made before the writ actually issues, though the litigation is impending is void. *Edwards v. Baugh*, 11 M. & W. 641, was relied upon as an authority for this proposition. But in that case Lord Abinger expressly bases his judgment (pages 645, 646) on the assumption that the declaration did not, either expressly or impliedly, show that a reasonable doubt existed between the par-

ties. It may be doubtful whether the declaration in that case ought not to have been construed as disclosing a compromise of a real *bonâ fide* claim, but it does not appear to have been so construed by the Court. We agree that unless there was a reasonable claim on the one side, which it was *bonâ fide* intended to pursue, there would be no ground for a compromise ; but we cannot agree that (except as a test of the reality of the claim in fact) the issuing of a writ is essential to the validity of the compromise. The position of the parties must necessarily be altered in every case of compromise, so that, if the question is afterward opened up, they cannot be replaced as they were before the compromise. The plaintiff may be in a less favorable position for renewing his litigation, he must be at an additional trouble and expense in again getting up his case, and he may no longer be able to produce the evidence which would have proved it originally. Besides, though he may not in point of law be bound to refrain from enforcing his rights against third persons during the continuance of the compromise, to which they are not parties, yet practically the effect of the compromise must be to prevent his doing so. For instance, in the present case, there can be no doubt that the practical effect of the compromise must have been to induce the commissioners to refrain from taking proceedings against Mrs. Bennett, the real owner of the houses, while the notes given by the defendant, her agent, were running ; though the compromise might have afforded no ground of defence had such proceedings been resorted to. It is this detriment to the party consenting to a compromise arising from the necessary alteration in his position which, in our opinion, forms the real consideration for the promise, and not the technical and almost illusory consideration arising from the extra costs of litigation. The real consideration therefore depends, not on the actual commencement of a suit, but on the reality of the claim made and the *bonâ fides* of the compromise.

In the present case we think that there was sufficient consideration for the notes in the compromise made as it was.

The rule to enter a verdict for the plaintiff must be made absolute.

Rule absolute.

CALLISHER v. BISCHOFFSHEIM.

IN THE QUEEN'S BENCH, JUNE 6, 1870.

[*Reported in Law Reports, 5 Queen's Bench 449.*]

DECLARATION, that the plaintiff had alleged that certain moneys were due and owing to him, to wit, from the Government of Honduras, and from Don Carlos Gattierez, and others, and had threatened and was about to take legal proceedings against the said government and persons to enforce payment of the same; and thereupon, in consideration that the plaintiff would forbear from taking such proceedings for an agreed time, the defendant promised to deliver to the plaintiff certain securities, to wit, bonds or debentures, called Honduras Railway Loan Bonds, for sums to the amount of £600, immediately the bonds should be printed. Averment, that the plaintiff did not take any proceedings during the agreed period or at all; and that all conditions had been fulfilled necessary to entitle him to sue in respect of the matters before stated. Breach, that the defendant had not delivered to the plaintiff the bonds, or any of them.

Plea, that at the time of making the alleged agreement no moneys were due and owing to the plaintiff from the government and other persons.

Demurrer and joinder.

James, Q.C. (*Rose* with him) in support of the demurrer.

Pollock, Q.C. (*Joyce* with him), *contra*.

COCKBURN, C.J. Our judgment must be for the plaintiff. No doubt it must be taken that there was, in fact, no claim by the plaintiff against the Honduras Government which could be prosecuted by legal proceedings to a successful issue; but this does not vitiate the contract and destroy the validity of what is alleged as the consideration. The authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference. If the defendant's contention were adopted, it would result that in no case of a doubtful claim could a compromise be enforced. Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he *bond fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a

good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations incident to it. The defendant's contention is unsupported by authority.

It would be another matter if a person made a claim which he knew to be unfounded, and, by a compromise, derived an advantage under it ; in that case his conduct would be fraudulent. If the plea had alleged that the plaintiff knew he had no real claim against the Honduras Government, that would have been an answer to the action.

BLACKBURN, J. I am of the same opinion. The declaration, as it stands, in effect states that the plaintiff, having alleged that certain moneys were due to him from the Honduras Government, was about to enforce payment, and the defendant suggested that the plaintiff's claim, whether good or bad, should stand over. So far the agreement was a reasonable one. The plea, however, alleges that at the time of making the agreement no money was due. If we are to infer that the plaintiff believed that some money was due to him, his claim was honest, and the compromise of that claim would be binding, and would form a good consideration, although the plaintiff, if he had prosecuted his original claim, would have been defeated. This case is decided by *Cook v. Wright*.¹ In that case it appeared from the evidence that the defendant knew that the original claim of the plaintiff was invalid, yet he was held liable, as the plaintiff believed his claim to be good. The Court say² that "the real consideration depends on the reality of the claim made, and the *bonâ fides* of the compromise." If the plaintiff's claim against the Honduras Government was not *bonâ fide*, this ought to have been alleged in the plea ; but no such allegation appears.

MELLOR, J. I am of the same opinion. If the plaintiff's claim against the Honduras Government was fraudulent, the defendant ought to have alleged it.

LUSH, J., concurred.

Judgment for the plaintiff.

Brandon for plaintiff.

Baxter, Rose, Norton & Co. for defendant.

¹ 1 B. & S. 559, 570 ; 30 L. J. (Q. B.) 321, 324.

² 1 B. & S. at p. 570 ; 30 L. J. (Q. B.) at p. 324.

TIMOTHY MANTER v. WINSLOW W. CHURCHILL.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS,
JUNE 24, 1879.

[*Reported in 127 Massachusetts Reports 31.*]

CONTRACT upon an account annexed for money paid. Answer, a general denial. Trial in the Superior Court, without a jury, before Brigham, C.J., who allowed a bill of exceptions in substance as follows :

Ephraim Churchill, the father of the defendant, died in the fall of 1865, then owner of one-quarter part of a schooner and left a widow, Martha H. Churchill, and four children. In November, 1865, Martha H. was appointed administratrix of the estate of Ephraim. The plaintiff became part owner and managing agent of the schooner in 1869, and transacted all the business which related to the interest of the estate of Ephraim in the schooner with Martha H. in her character of administratrix. In this character she joined in a bill of sale of the schooner in March, 1876, and prior thereto received from the plaintiff one quarter of the profits of the schooner's business. The personal estate of Ephraim remaining in the hands of the administratrix, after the payment of debts, was never distributed among the heirs at law of Ephraim, and they have hitherto allowed the administratrix to use it for her maintenance, and treat it as her own property. The business of the schooner was conducted, in the year prior to her sale, with such loss that on June 1st, 1876, when the final accounts were made up by the plaintiff, the sum of \$110 was due to the plaintiff from the estate of Ephraim, being one quarter of the loss for the previous year's business, and the further sum of \$3.29 was due to the plaintiff from the estate, being one quarter of the loss for the year prior to 1875. These sums, amounting to \$113.29, the plaintiff sought to recover in this action, less the sum of \$62.50, paid since this action, as hereinafter stated, on the ground of a special oral promise of the defendant to pay the same, in consideration of the plaintiff's forbearing, for the period of about three months, to bring an action against the administratrix, the defendant or other heirs at law of Ephraim to recover the same. The plaintiff also claimed to recover upon an implied promise of the defendant to pay the sum sought to be recovered in this action, in consideration of the plaintiff's forbearing, for a considerable period

of time, to bring an action against either the administratrix, the defendant, or the other heirs at law of Ephraim.

The judge found that the defendant made an oral promise to pay the account declared on to the plaintiff's attorney, and also to the plaintiff; that this promise induced the plaintiff to forbear, and he did forbear, bringing this action, for the period of three months, against the administratrix, the defendant or the other heirs at law of Ephraim; that the defendant solicited the plaintiff to forbear bringing an action against the administratrix, assuring the plaintiff that she had a disposition to pay, and would, from sources which were specified by the defendant, have the means of paying the account, and, by his declarations and conduct, intentionally caused the plaintiff to believe that the account would be paid by the administratrix, and, if not paid by her, would be paid by the defendant, or by the heirs at law, within one year, and thus induced the plaintiff to forbear; and that he did forbear bringing this action against the administratrix for the period of at least one year.

After this action was brought, the defendant's sisters paid the plaintiff \$62.50, on account of the sum sought to be recovered in this action, and, before such payment, the defendant and the other heirs proposed to convey to the plaintiff land which had been a part of the estate of Ephraim, in payment of the account declared on, and a deed was made to carry into effect this proposition, but was not executed, by reason of the disagreement of the parties as to the price at which the land should be received by the plaintiff, in settlement of his account. The defendant also relied upon the Statute of Frauds. The plaintiff contended that this defence was not open under the pleadings; and the judge did not base his finding upon that defence.

Upon these facts the judge ruled that the action could not be maintained, and ordered judgment for the defendant, and the plaintiff alleged exceptions.

C. G. Davis & A. Lord for the plaintiff.

D. E. Damon for the defendant.

LORD, J. It is entirely clear that there was no evidence tending to hold the defendant as an original promisor. The only question is whether he was liable to pay the debt of his mother, Martha H. Churchill. His liability for that debt is not denied upon the ground that he did not promise in writing to pay it. The Statute of Frauds is not pleaded, the plaintiff contends that that defence is not open, because not pleaded, and the chief Justice of the Superior Court states expressly that his finding for the defendant was not based upon the Statute of Frauds. He

finds that the defendant promised to pay the debt ; and the question presented for our consideration is, whether such promise was founded upon a sufficient consideration, or whether it was mere *nudum pactum*.

Mere forbearance to sue is not a sufficient consideration for a promise to pay the debt of another. *Mecorney v. Stanley*, 8 Cush. 85. An agreement to forbear and actual forbearance under such agreement is a sufficient consideration. *Robinson v. Gould*, 11 Cush. 55.

In this case, the presiding judge, although he finds there was forbearance to sue, and finds that the plaintiff was induced to forbear because of the request of the defendant, yet does not find that there was upon the part of the plaintiff any agreement to forbear. The plaintiff, therefore, was under no obligation, legal or moral, not to bring a suit ; and he might at any moment have commenced an action against the mother of the defendant, without any cause for complaint on the part of the defendant that he had violated any promise or engagement to him ; and although the forbearance was at the request of the defendant, and at his solicitation, still it is not found to have been by virtue of an agreement. There are cases in which the fact of forbearance, and the circumstances under which it exists, may be properly left to the jury as evidence tending to show a promise to forbear. *Boyd v. Freize*, 5 Gray, 553. But in this case, decided by the Court without the intervention of a jury, it is to be presumed that the evidence did not satisfy the Court of an agreement to forbear, and the Court therefore found the promise to be without consideration, and that no action could be maintained upon it.

Exceptions overruled.

CLINE & CO. v. TEMPLETON.

IN THE COURT OF APPEALS OF KENTUCKY, SEPTEMBER 22, 1880.

[*Reported in 78 Kentucky Reports 550.*]

Rodman & Brown and *John A. Middleton* for appellants.

Byron Bacon for appellee.

HINES delivered the opinion of the Court.

The admitted facts in the pleadings in this case are : The sole consideration of the note¹ sued on was the agreement to

¹ See *supra*, p. 1, note 1.

forbear the prosecution of a suit by Susan Cline against appellee ; that the suit was brought by Susan Cline against appellee for seduction, and that at the time she was an adult unmarried woman ; that at the time of the alleged assignment of the note by Susan Cline to appellants, they had full knowledge of all these facts. It is further shown in evidence that the note before maturity was discounted to the German Security Bank, and, having been protested for non-payment, it was taken up by appellants.

The questions in the case are : First, was the note unenforceable for want of consideration ? Second, are the rights of the parties altered by the fact that the note was put on the footing of a foreign bill of exchange by discounting it to the bank ?

That there is no cause of action, either at common law or under the statutes, in behalf of a woman for seduction, is clearly established. (*Woodward v. Anderson*, 9 Bush, 624.) It is laid down, both in *Parsons on Contracts* and in *Chitty on Contracts*, that an agreement to forbear to prosecute a claim which is wholly and certainly unsustainable at law or in equity, is no consideration for a promise. (*Parsons*, Vol. I., p. 44 ; *Chitty*, Vol. I., pp. 35-46.) This proposition appears to be so well established that further citation of authorities seems to us unnecessary. We need not discuss the question as to whether past cohabitation is a good consideration for a promise, since it is admitted that the sole consideration was the agreement to forbear suit.

The effect of the statute in regard to the discounting of notes in bank, so as to place them on the footing of bills of exchange, is to fix the rights and liabilities of the parties as they would be if the paper had originally been a foreign bill of exchange.

In this case appellants, having received the note sued on with the knowledge that it was without consideration, took it up from the bank with the same right in appellee to make defence as he had prior to the discounting. Appellants being holders with notice of the infirmity in the bill, it is in their hands subject to all the defences that existed between the original parties to the paper.

Judgment affirmed.

J. H. GUNNING v. J. P. ROYAL.

IN THE SUPREME COURT OF MISSISSIPPI, OCTOBER TERM, 1881.

[Reported in 59 Mississippi Reports 45.]

APPEAL from the Circuit Court of Warren County.

YOUNG, J.

For the purpose of carrying dirt from a hill which he was cutting down, the appellant hired a mare and cart from the appellee, who furnished an inexperienced negro boy for driver. While a fall was being made at one end of the work, the rule was for the cart to be loaded at the other. On one occasion the boy, although warned by a laborer of the appellant, drove to the wrong end where there was no dirt, but where the bank was ready to be caved, and while he was attempting to comply with another laborer's direction to turn the mare away, some earth accidentally fell, injuring the animal so that she was afterward killed. The appellee demanded \$150 for his loss. The appellant denied liability, but after a long dispute and an ineffectual attempt at arbitration, gave his note for \$66 in settlement of the controversy. When sued he pleaded want of consideration, and a jury being waived, the Court gave judgment for the plaintiff.

Cowan & McCabe for the appellant.*W. R. Spears* for the appellee.

CAMPBELL, J., delivered the opinion of the Court.

The facts disclosed by the evidence acquit Gunning of all blame with respect to the injury to the mare and cart he had hired of Royal. He was, therefore, not legally answerable to Royal for the loss he suffered, or any part of it, and the giving of his note in settlement of the *controversy* did not preclude him from showing that he was not legally liable for the payment of the sum promised. The existence of a dispute or controversy between parties is not a sufficient consideration to support a promise to pay money in settlement of it, where no valid demand for anything whatever exists in favor of the promisee. There must be a valid demand to some extent, or for something, to uphold a promise of this kind. Giving a note to settle a dispute or controversy does not impose any liability on the maker, if he gains nothing and the payee loses nothing by it. In such case it devolves on the maker of the note, when

sued, to show the entire want of any consideration for his promise, and Gunning did so in this case. *Foster v. Metts*, 55 Miss. 77, and cases there cited ; *Boone v. Boone*, 58 Miss. 820.

Reversed and remanded.

O. F. BELLOWS v. E. A. SOWLES.

IN THE SUPREME COURT OF VERMONT, JANUARY TERM, 1883.

[*Reported in 55 Vermont Reports 391.*]

ASSUMPSIT with two special counts and common counts. Pleas, the general issue, special pleas in bar, and notice of special matters in defence. Trial by jury, September Term, 1880, Royce, J., presiding. Verdict for the plaintiff. The declaration alleged in substance :

That the plaintiff was a relative and heir-at-law of Hiram Bellows ; that by the terms of the last will of said Bellows no allowance was made for the plaintiff ; that the plaintiff claimed and insisted that he was left out of said will, and that no provision or allowance out of the estate was made for him through undue influence used upon said Bellows by said defendant and his wife, and that said will was void ; that " whereas, the said defendant, being then and there the executor named in said will, and being largely interested personally in said estate, and as legatee and the husband of the principal legatee under that will, and well knowing the claims of the plaintiff, and that he had employed counsel as aforesaid, and that other heirs were then and there making similar claims, and being anxious to have said will sustained, had also employed counsel for that purpose, and it was then and there expected by the parties that a contest would be had upon the approval of said will, which would involve the expenditure of a large amount of money and hinder and delay the settlement of said Hiram Bellows' estate and the receipt by the said defendant and his said wife of their said legacies, and other sums of money which the defendant would otherwise receive.

" And the plaintiff avers that on, to wit, December 6th, 1876, A.D., to wit, at St. Albans, aforesaid, the plaintiff met the defendant, by appointment, at his, defendant's, house, and then and there the matters and things above set forth were fully talked over and discussed, and then and there, in consideration of the premises, and that the said plaintiff, at the special in-

stance and request of the said defendant, would see one Charlotte Law, who was an heir of said Hiram Bellows, and was then and there intending to contest the validity of said will, and would use his influence to have her allow said will to be approved, and that the plaintiff would forbear to contest the approval of said will of the said Hiram Bellows and allow the same to be approved by the Probate Court, aforesaid, and would not appeal from the decision of said Court, he, the said defendant, undertook and then and there faithfully promised to pay the plaintiff the sum of \$5000, whenever, after twenty days had elapsed from the date of the approval of said will by said Probate Court, he should be thereunto requested, to wit, at St. Albans, aforesaid. And the said plaintiff avers that, confiding in the promise and undertaking of the said defendant, so made, as aforesaid, afterward, to wit, on the day and year aforesaid, he did see Charlotte Law, and did use his influence with her to allow said will to be approved, and did forbear to contest the approval of said will of the said Hiram Bellows, and did allow the same to be approved by said Probate Court, and did not appeal from said approval."

On trial it appeared that said Bellows died testate, on October 18th, 1876 ; that his will was presented to the Probate Court on November 13th, 1876, was probated on December 7th, following, and no appeal taken from its allowance ; that the plaintiff was a nephew and heir of said Bellows, and not a legatee ; that the defendant was not an heir, but executor, and his wife and daughter were both legatees ; and that the estate was worth between \$250,000 and \$300,000. There was no evidence in the case tending to show any want of capacity on the part of said Bellows to make a will, or to show that any ground of action existed for contesting the validity of the will, or that any doubt existed as to its validity, and no cause was shown why it should not have been admitted to probate, except the evidence of the plaintiff.

The plaintiff's evidence tended to show that shortly after the death of Mr. Bellows he learned what the provisions of the will were, that he determined to contest its probate ; employed counsel who looked up the law and evidence of the case and advised plaintiff to contest it ; that he gave the Probate Court notice of his intention to contest the will ; and that on December 6th, the day before the day set for the probate of the will, he came to St. Albans with counsel, for the purpose of contesting the will, and that on the evening of that day, upon the invitation of the defendant, he, in company with his brother James, went to defendant's house to talk over the matter ; that they

talked about contesting the will ; that plaintiff said that he had come out to test the will ; that he thought it was not a will Mr. Bellows ever made ; that he thought it was got up by the defendant and his wife ; that defendant replied, that was no use ; that he had seen Aldis, J., and that he had looked the will over and that it could not be broken ; that plaintiff replied that his counsel told him that it could ; that defendant then wanted to know what he wanted, and plaintiff said he ought to have \$10,000 ; and defendant replied, that was too much ; whereupon plaintiff said the Atwood boys got \$5000 each, and that he (plaintiff) was nearer to deceased than they, and that his counsel advised him not to take anything less than \$10,000 ; that defendant said he wanted to get the matter straightened out as soon as he could, and if it was contested it was agoing to expose a great many things that he would rather be kept back ; that it was agoing to make taxes higher, and everything else ; that defendant then asked him if plaintiff would take \$5000 ; and that plaintiff then consulted with his brother privately, and concluded he had better accept than to go on and have a lawsuit about it ; and thereupon told defendant he would accept it ; that defendant said if he, plaintiff, would not appear to contest the will, and would try to prevent others from doing it, he should have as much as that ; that he, plaintiff, proposed to put it in writing, but defendant said to him, " Do you doubt my word ? " and plaintiff replied, " I don't doubt your word ; " that plaintiff was not to enter an appeal from the allowance of the will ; that defendant agreed to pay the \$5000 as soon as he was satisfied that nobody appeared to contest the will, after the twenty days from its allowance had passed ; that plaintiff said he would take the offer ; that defendant asked plaintiff if he thought there were any others who were coming in to contest the will ; that plaintiff said he did not know of any others, except it was Charlotte Law ; that plaintiff said he would go and see her, and if she had a notion to come down and contest the will, he would try and persuade her not to, and the defendant said he thought that he, plaintiff, had better see her ; that Mrs. Law was a niece of said Hiram Bellows, and lived in Cambridge, Vt. ; that within three or four days, and before the twenty days had expired, he, the plaintiff, did see Mrs. Law and did use his influence with her not to contest the will, but he did not influence, or attempt to influence, any one else in that respect. There was no evidence in the case that Mrs. Law ever designed or intended to contest the will, but, on the contrary, Mrs. Law testified that she did not make any preparation to contest the will, and that she thought she never

designed to, and that plaintiff did not use his influence with her not to contest the will. The defendant's evidence, which was uncontradicted in this respect, showed that Mr. Bellows, at the time he drew up and executed his will, was a man of great firmness and decision of character, and not easily influenced by others; that the will was composed and written by him, and was introduced in evidence; that he, with his family, lived in the same family with said Bellows for twelve or thirteen years previous to the death of said Bellows; and that no influence was ever had or attempted upon him in regard to his will.

The defendant filed a motion for a verdict:

1. Because said declaration does not allege that the plaintiff had been left out of the will through any undue influence; 2. There is no evidence in the case tending to show that any undue influence had been used; 3. There is no evidence in the case tending to show that any reasonable doubt existed as to the validity of the will; 4. The evidence shows that plaintiff has no cause of action.

Motion overruled. The defendant requested the Court to charge the jury.

First, that the statement of plaintiff, that defendant said to him his wife could wind Mr. Bellows round her fingers, is not to be considered by them as evidence tending to show that any undue influence had been used. Second, that if the jury find that Charlotte Law was not intending to contest the validity of the will, or that if plaintiff did not use his influence with her to have her allow said will to be approved, they should render a verdict for the defendant. Third, that there is no evidence in the case tending to show any just cause why the will should not have been admitted to probate as valid, nor that any doubt existed as to its validity, and that their verdict should be for the defendant. Fourth, that if the jury find that the plaintiff as a reasonable, prudent, and conscientious man, had no good ground to believe that any undue influence had been used, and had no good reason to doubt the validity of the will, then the verdict should be for the defendant.

Edson, Start & Cross and *L. P. Poland* for the defendant.

The Court refused the requests. After verdict the defendant filed a motion in arrest. The reasons given were nearly like those in the motion for a verdict. Motion overruled. The defendant then moved to set aside the verdict and for a new trial, on the ground that one of the jurymen was an alien. This motion was tried by the Court, and the Court found that he was a citizen. Questions arose as to the admission of certain

evidence on this motion ; but it is not necessary to state them, as they were not decided by the Court.

Wilson & Hall, G. A. Ballard, Noble & Smith, and Farrington & Post for the plaintiff.

Ross, J. The exceptions taken on the trial, as well in regard to the defendant's motion for a verdict, as in regard to the refusal of the Court to charge as requested, relate mainly to the subject of the consideration for the defendant's promise. This subject, and the particular phase of it involved in this case, was under consideration in *Ormsbee v. Howe*, 54 Vt. 182. It is there said : " The compromise of a doubtful right is a sufficient consideration for a promise, and it does not matter on whose side the right ultimately turns out to be." The soundness of this proposition is not fairly open for debate. It is elementary. The plaintiff was heir at law of Hiram Bellows. He was interested in whatever disposition he made of his property. He had the right to oppose the establishment of any will made by him when offered for probate. Not being a legatee or devisee in the will of Hiram Bellows, it was for the plaintiff's interest to prevent the establishment of the will. The defendant was named executor in the will, and his wife and daughter were special legatees, and his wife the residuary legatee. He was, therefore, interested in the establishment of the will. Hence, if the plaintiff had any reasonable, *bonâ fide* ground to oppose the establishment of the will, and forbore to exercise such right at the request, and because of the promise of the defendant, such promise would be founded upon a good consideration. There was evidence tending to show such forbearance and promise. By such forbearance the defendant gained what was of value to him, the establishment of the will without delay or opposition, and at less expense, and the plaintiff lost what might be of value to him, the opportunity to oppose its establishment, either of which was a good consideration for the promise. It was not necessary for the plaintiff to allege and prove that his ground of opposition to the will would have been found sufficient to have defeated its establishment. It was enough if he had an honest, reasonable ground of opposition and intended to use it, and forbore to do so on account of the defendant's promise. Hence the defendant was not entitled to have his motion to have a verdict ordered by the Court in his favor complied with. The plaintiff was neither bound to allege nor prove that undue influence had been used to procure the making of the will. But he was, when that was brought in question, bound to show that he honestly thought he had good and reasonable ground for making the claim that the will so

far as it related to him was the production of undue influence, and for that reason he honestly intended to oppose its establishment. Whether the plaintiff, acting as a reasonable, prudent, and conscientious man, had good ground to believe undue influence had been used, and for that cause he had good reason to doubt the validity of the will, and therefore honestly proposed to oppose its establishment, or whether he had no good ground to believe undue influence had been used, and so had no good reason to doubt the validity of the will, and dishonestly put the same forth as a ground of opposition to the establishment of the will, makes a very material difference in regard to the consideration his action would afford to support the defendant's promise to pay him \$5000 for forbearing to oppose the establishment of the will. On the first supposition his forbearance would be the yielding of a right which he honestly upon reasonable grounds supposed existed and intended to assert, and would furnish ample consideration for the defendant's promise. On the latter hypothesis, his opposition to the will was dishonest, unfounded, factitious, and set up to extort money from the defendant. In short, his opposition to the will, if successful, would be a blackmailing operation. There is no essential conflict in the authorities produced by the parties on this subject. Cases can be found where no claim is made but that the compromised right was an honest one, honestly entertained and asserted, and in which no reference is made to the *bonâ fide* character of the transaction. The doubtful right compromised, to be a good consideration for a promise, must upon reasonable grounds be honestly entertained by the person proposing to assert it. It is neither necessary to allege nor prove that the right actually existed. The case of *Ormsbee v. Howe*, *supra*, is in point. If money has been actually paid in compromise of a false and fraudulent claim dishonestly made and asserted, it may be recovered back as held in *Hoyt v. Dewey*, 50 Vt. 465. Upon these views of the law the defendant's first and third requests were properly refused; but his fourth request should have been substantially complied with. It is, however, claimed that if the plaintiff yielded no right, the defendant gained by the compromise in that he avoided delay and expense in the establishment of the will, and for this reason he should be held to perform his promise. But if the plaintiff's opposition to the establishment of the will was fraudulent and put forth to extort money, he would not only yield nothing, but the defendant would gain nothing, by the compromise—that is, there would be no compromise, because nothing on one side of it. A compromise is the yielding of something by each of two parties, and

can only exist when something is yielded by each party to it. Besides, *fraud* in the foundation of a claim permeates the whole superstructure, taints and vitiates the entire transaction. Ormsbee v. Howe, *supra*. It is probable the plaintiff in such a case would be liable for whatever expense he should cause the defendant by the dishonest assertion of a false claim to extort money. Hoyt v. Dewey, *supra*. The defendant's motion in arrest of judgment, on these views, was properly overruled.

The other questions arising on the motion for a new trial in regard to the disqualification of the juror Hibbard, will never arise again probably in the new trial of this case, and need not be considered. It presents some nice questions in regard to presumptions which are not altogether free from difficulty. On the exceptions the judgment of the County Court is reversed, and cause remanded for a new trial.

The petition for a new trial is not sustained. The alleged matter is so far collateral to the main issue that the Court cannot say it would, if established, avail to change the result if a new trial should be granted thereon. The same is dismissed with costs to the petitionee.

MILES v. NEW ZEALAND ALFORD ESTATE COMPANY.

IN THE COURT OF APPEAL, FEBRUARY 11, 1886.

[*Reported in Law Reports, 32 Chancery Division 266.*]

THE New Zealand Alford Estate Company, Limited, was incorporated under the Companies Acts of 1862 and 1867, with articles of association, the material clauses of which were as follows :

" 8. The company shall not be bound to recognize any contingent, future, partial, or equitable interest, in the nature of a trust or otherwise, in any share, or any other right in respect of any share, except an absolute right thereto in the person from time to time registered as the holder thereof. . . ."

" 23. No shares shall be transferred to a stranger so long as the company or any member is willing to purchase the same at a fair value."

" 28. The company may decline to register any transfer of shares upon which the company has a lien by virtue of clause 43 hereof."

" 43. The company shall have a first and paramount lien upon all the shares of each member for his debts, liabilities, and engagements, solely or jointly with any other person, to or with the company, whether the period for the payment, fulfilment, or discharge thereof shall have actually arrived or not."

" 44. For the purpose of enforcing such lien the directors may sell the shares subject thereto without any notice to or consent by the holder of such shares, or any other person ; but no sale shall be made unless and until default be made in the payment, fulfilment, or discharge of such debts, liabilities, or engagements."

The defendant, Samuel Grant, who was one of the promoters of the company, was in May, 1882, and at the hearing of this action was still, the registered holder of 125 shares of £100 each in the company. In May, 1882, when £40 apiece had been paid up on these shares, Grant accepted and discounted two accommodation bills payable at six and eighteen months after date for £5000 each, drawn on him by the plaintiff, E. P. W. Miles, applied the proceeds to his own use, and deposited the certificates of his shares with the plaintiff.

By indenture dated October 19th, 1882, the defendant Grant charged his 125 shares with the two sums of £5000 and interest thereon at £5 per cent per annum, and covenanted at any time during the continuance of the security to execute a legal transfer of the shares in favor of the plaintiff ; and by an agreement under seal of the same date Grant covenanted with the plaintiff to pay all calls upon the shares during the continuance of the security, and it was agreed that in default the plaintiff might pay such calls and add the moneys so paid with interest thereon to his security.

On November 4th, 1882, notice in writing of the plaintiff's interest in Grant's 125 shares under the indenture of October 19th, 1882, was served upon the company, and this notice was acknowledged by the company on November 6th, and was entered in the share register.

When the bills came to maturity Grant made default in payment, and the plaintiff paid them.

A call of £20 per share was made by the company on December 12th, 1882. Grant made default in payment, and this and the subsequent calls made by the company were paid by the plaintiff in order to avoid a forfeiture of the shares.

Grant, besides being a promoter of the company and the holder of the above-mentioned shares, was the vendor to the company of the property in New Zealand known as the Alford Estate, the acquisition and working of which was the substan-

tial object of the formation of the company. He was also the chairman of the board of directors, and at a general meeting of the company held on March 15th, 1883, an angry discussion took place, at the close of which he gave to the company a written guarantee or warranty signed by himself in the following terms :

“ GENTLEMEN : I hereby guarantee that a dividend (duly earned during the year) of not less than £3 per centum per annum be paid to the shareholders for the year ending June 30th, 1883, and afterward that there shall be paid to them a yearly dividend of not less than £5 per centum per annum (duly earned during the year) for a period of ninety years, and I undertake within three calendar months after the end of any and every year to pay to you any sum requisite to pay the agreed minimum dividend if the company has not earned it.”

No resolution was passed at the general meeting with reference to the giving of the guarantee.

Grant was adjudicated a bankrupt on February 19th, 1884. In May, 1884, there being due to the plaintiff upon the security of the indenture and memorandum of agreement of October 19th, 1882, the sum of £7885, he applied to the company to do and concur in all acts necessary for effecting a sale and transfer of the 125 shares.

The company, however, claimed a lien on the shares under the guarantee given to them by Grant and their articles of association, in priority to the plaintiff's charge ; and they refused to permit any sale or transfer of the shares until their claim was satisfied. The plaintiff then brought this action against the company and Grant and his trustee in bankruptcy, and claimed a declaration that under the deed of October 19th, 1882, he was entitled to a first charge on the 125 shares for the principal and interest secured thereby, and for all sums paid by him for calls, and to have this charge enforced by foreclosure or otherwise, and he pleaded that the guarantee given by Grant was not under seal, that no consideration had been given for it, and that even if consideration had been given, the document did not comply with the requirements of the Statute of Frauds. To this the company rejoined that the guarantee “ was executed as part of a contract whereby the company and the shareholders for whose benefit it was executed, in consideration of the execution by the defendant S. Grant of the said documents, agreed to put an end to certain contemplated proceedings against the defendant S. Grant and to give up certain claims against him, and that they did in pursuance of such con-

tract abandon such proceedings and give up such claims and accept the guarantee in full accord and satisfaction of the right of action founded on such claims ;” and they pleaded also that the said contract was one to be performed, and that it was in fact performed, within one year from the making thereof.¹

The action came on for trial before North, J., upon motion for judgment in default of pleading against the defendant Grant and his trustee in bankruptcy, and was heard on June 22d, 23d, and 24th, 1885.²

Davey, Q.C., and Stirling for the plaintiff.

Barber, Q.C., and Blake Odgers for the company.

C. Lucas, the trustee in bankruptcy of Grant, did not appear. The appeal came on for hearing on February 4th, 1886.

Barber, Q.C., and Blake Odgers in support of the appeal.

Davey, Q.C., and Stirling for the plaintiff.

COTTON, L.J. This is an appeal of the defendant company from a judgment of North, J., in an action brought by the plaintiff in order to enforce his right under an equitable mortgage on shares in the company, and two questions are raised for the decision of the Court. First, whether the company, supposing them to have a legal claim against Grant, the holder of the shares, are entitled under their articles of association to priority for that claim as against the claim of the plaintiff ; and, secondly, whether they had in fact any legal claim against Grant.³ North, J., held that, in fact, they had a good claim, but he held, on the authority of *Bradford Banking Company v. Briggs & Co.*,⁴ as decided in the Court below, that the company were not entitled in priority to the plaintiff.

But then comes the question, Had the company in fact any legal claim as against Grant ? Their claim was under a letter signed by Grant, which guarantees or undertakes that a certain yearly dividend shall be paid to the shareholders during a long period of years, and it is objected that no consideration appears upon the face of the letter, and that no consideration was in fact given to Grant for that promise (I call it “promise,” because to call it “contract” would be to assume there was consideration) given by the shareholders.

Now there was much argument upon the question, what is a good consideration for a compromise ; and there are authorities which for a considerable time were considered as laying down

¹ A statement of the evidence relating to the giving in fact of consideration has been omitted.—ED.

² The opinion of North, J., has been omitted.—ED.

³ Only so much of the opinion is given as relates to this question.—ED.

⁴ 29 Ch. D. 149.

the law upon the subject ; but Lord Esher, the present Master of the Rolls, in *ex parte* Banner,¹ is supposed to have thrown doubts on these authorities ; and what he said was in fact that if the question ever came before this Court the authority of Callisher *v.* Bischoffsheim,² Ockford *v.* Barelli,³ and Cook *v.* Wright⁴ would have to be considered.

Now, what I understand to be the law is this, that if there is in fact a serious claim honestly made, the abandonment of the claim is a good "consideration" for a contract ; and if that is the law, what we really have to now consider is whether in the present case there is any evidence on which the Court ought to find that there was a serious claim in fact made, and whether a contract to abandon that claim was the consideration for this letter of guarantee. I am not going into the question at present as to how far the Statute of Frauds will raise any difficulty in the way. And I think also that the mere fact of an action being brought is not material except as evidence that the claim was in fact made. That, I think, was laid down by Lord Blackburn in Cook *v.* Wright, and also in Callisher *v.* Bischoffsheim, and, subject to the question whether these cases are overruled, or ought to be considered as unsound, that, I think, is a correct statement of the law. Now, by "honest claim," I think is meant this, that a claim is honest if the claimant does not know that his claim is unsubstantial, or if he does not know facts, to his knowledge unknown to the other party, which show that his claim is a bad one. Of course, if both parties know all the facts, and with knowledge of those facts obtain a compromise, it cannot be said that that is dishonest. That is, I think, the correct law, and it is in accordance with what is laid down in Cook *v.* Wright⁵ and Callisher *v.* Bischoffsheim⁶ and Ockford *v.* Barelli.⁷ What was stated in Cook *v.* Wright⁸ by Lord Blackburn is this : "We agree that unless there was a reasonable claim on the one side, which it was *bonâ fide* intended to pursue, there would be no ground for a compromise ; but we cannot agree that (except as a test of the reality of the claim in fact) the issuing of a writ is essential to the validity of the compromise." Again, what his Lordship says in the subsequent case of Callisher *v.* Bischoffsheim⁹ is this : "If we are to infer that the plaintiff believed that some money was due to him, his claim was honest, and the compromise of that claim would be binding and would form a good consideration, although the plaintiff, if he had prosecuted his original claim, would have been de-

¹ 17 Ch. D. 480.⁴ 1 B. & S. 569.⁷ 20 W. R. 116.² Law Rep. 5 Q. B. 449.⁵ *Ibid.* 559.⁸ 1 B. & S. 569.³ 20 W. R. 116.⁶ Law Rep. 5 Q. B. 449.⁹ Law Rep. 5 Q. B. 452.

feated." The doubt of the Master of the Rolls seems to have been whether a compromise would not be bad, or a promise to abandon a claim would be a good consideration if, on the facts being elicited and brought out, and on the decision of the Court being obtained, it was found that the claim which was considered the consideration for the compromise was a bad one. But if the validity of a compromise is to depend upon whether the claim was a good one or not, no compromise would be effectual, because if it was afterward disputed, it would be necessary to go into the question whether the claim was in fact a good one or not; and I consider, notwithstanding the doubt expressed by the Master of the Rolls, that the doctrine laid down in *Cook v. Wright* and *Callisher v. Bischoffsheim* and *Ockford v. Barelli* is the law of this Court.

Now was there here any claim in fact made on behalf of the company against Grant, and was there, in fact, anything which would bind the company to abandon that claim. The conclusion at which I have arrived is, that there is no evidence on which we ought to rely that there was in fact a claim intended to be made against Grant, and, in my opinion, on the evidence before us, we ought not to arrive at the conclusion that there was ever intended to be any contract by the company, much less that there was in fact any contract binding the company that that claim should not be prosecuted, and should be given up. [His Lordship alluded shortly to the facts of the case, and continued.] Now, undoubtedly, on the evidence, several of the shareholders present at the general meeting of March 15th, 1883, expressed a very hostile feeling against Mr. Grant, who had sold the property to the company; that is admitted by him, and is in my opinion clear. But then what was done? There is nothing at all on the face of this letter of guarantee, as I have already stated, which says that it was given by Grant in consequence of the company giving up any claim they might have against him, and there is nothing whatever in the minutes of the board which states in fact that this was so, nor is there anything after that time in the minutes of the board of directors which can be referred to as showing an agreement by them to give up any claim they otherwise intended to prosecute against him. What I should say was the state of the case is this—there was angry feeling, and Mr. Grant thought it might result in proceedings being taken against him; and, therefore, what he considered the wisest course was to make this offer in the hope and expectation that he would keep things quiet, and let things go on peaceably.

Now, in my opinion, a simple expectation, even though real-

ized, would not be a good consideration for the promise which he gave. In order to make a good consideration for the promise there must be something binding done at the time by the other party, there must be something moving from the other party toward the person giving the promise. In my opinion, to make a good consideration for this contract, it must be shown that there was something which would bind the company not to institute proceedings, and shown also that in fact proceedings were intended on behalf of the company ; and, in my opinion, I cannot come to the conclusion as a matter of fact that these two things existed. It is true that directors were present at the meeting, and that their guarantee was entered on the minutes, but although this was the case, it cannot in my opinion be considered that the directors by being there entered into any contract as directors not to enforce the claim of the company. The proper mode of proving any agreement made by the directors would be the production of evidence of its having been made at a meeting held by them as the persons having the conduct of the business of the society. No doubt, they might, if they had been so minded, at a meeting of the board agree that they should not make any claim against him in consideration of this having taken place, but I find nothing of that kind.

Again, this is an incorporated company, and even if any statement had been made at this meeting that no proceedings should be taken, yet to bind the company there ought to be something done by way of a resolution, and mere statements by individual members that they were satisfied with this guarantee would not in any way bind the company so as to prevent them from taking proceedings if they ever intended to do so. In my opinion this promise was given in the expectation that this would be a sop to the angry shareholders, and that no proceedings would be taken. The mere fact that none have been taken, will not in my opinion make that a consideration, unless (putting aside the question as to the company being bound) something was done or said in such a way as to be the action or saying of the company, that if this guarantee was given no proceedings would be taken. Of course if this company were an individual, and the individual made a representation that if this guarantee was given he would take no proceedings, that would be a contract binding him, but in my opinion if a company is to be bound, it ought to be bound by some more formal proceedings, either by the action of the directors sitting as such, or by something equivalent to a resolution of the shareholders in general meeting.

North, J., although he decided in favor of the plaintiff, has held that there was sufficient consideration for the guarantee ; and if he had come to the conclusion that there was upon the evidence before him that which amounted to a contract binding the company, then I should undoubtedly feel some difficulty, because he had a better opportunity of judging of the evidence than we can have. But, on reading his judgment, I come to the conclusion that he rather considered there was an expectation than that this would be the result, and that if that expectation was performed and completed, this would be enough to give a consideration.

Undoubtedly, the evidence of Mr. Grant cannot be considered very satisfactory, and it is not very satisfactory to find that Mr. Redmayne, the secretary of the company, who was the witness on the other side, was not cross-examined, but, looking at the evidence of Mr. Redmayne, I cannot see that he states as a fact that there was an intention to take proceedings, or, as a fact, that anything took place at the meeting which could be considered as a representation by the company, or by the directors, or by any of those present, that these proceedings, in fact intended, should be abandoned.

[His Lordship then read paragraph 4 of Mr. Redmayne's affidavit, and continued.]

Now, it was admitted by the counsel for the company that what is there referred to is the resolution passed at the meeting of the directors on January 22d, and we see what the witness turns it into in his affidavit. That is his strongest statement. He does say, indeed, in paragraph 5 that at the meeting of the company on March 15th, 1883, Grant " was told that it was the intention of the defendant company to take immediate proceedings against him," but he does not say it was so intended, and the remainder of this paragraph is expressed in doubtful terms, so that, in my opinion, we ought not to rely upon that evidence as proving that anything took place at the meeting amounting to a contract binding the company to abandon proceedings which were, in fact, intended to be brought. And, in my opinion, it was necessary to establish that there was a claim in fact made and abandoned. North, J., relies very much upon the consideration that no action was in fact brought. But I think it is hardly necessary to deal with that, for it may be that this sop was sufficient to calm the angry spirit ; and the fact that no action was brought does not show that there was any contract not to bring an action.

North, J., seems to have been much pressed by the consideration that Mr. Grant always looked upon this as a binding

agreement. How far Mr. Grant was aware of the law as to consideration one does not know, but undoubtedly he did not intend the guarantee to be illusory; undoubtedly he looked upon it as a promise, and it has been argued that he would not have made this promise unless he got something for it. In my opinion, however, the evidence shows that he did not regard it as a contract.

I come accordingly to the conclusion that there is, in fact, no consideration to support the guarantee on which the company rely, and to make it a contract binding on Mr. Grant; and as I have come to the conclusion that there was not sufficient consideration to support the promise, it is not necessary for me to enter into the question as to the Statute of Frauds.

BOWEN, L.J. But then comes this further important question. Mr. Davey endeavored to support the decision appealed from on a question of fact, by displacing upon the evidence the verdict passed by North, J., which, so far as that question of fact is concerned, was against him. Therefore we have to determine whether or no there was any consideration for this guarantee, and it is upon that point that I am, with great regret, obliged to state that my opinion is at variance with the view at which Cotton, L.J., has arrived. The inquiry whether there was or was not consideration for this guarantee renders it necessary to say some words upon the law,¹ and then to apply the law to the question of fact.

Speaking broadly, what has to be determined is, in my opinion, whether there was at a critical moment any forbearance to press a real claim on the part of the company, or of the directors of the company, who had ample powers under their articles of association to act for the company, and, if so, whether such forbearance was brought about by the express or implied request of Mr. Grant, and in consideration of his guarantee. A valuable consideration may, of course, either consist of some right, interest, profit, or benefit which accrues to one party, or some forbearance, or detriment, or loss, or responsibility, which is given to or undertaken by the other. We have to see here in the first place whether there was forbearance promised, in which case the promise would be the consideration for the guarantee, or whether there was an actual forbearance given at the request of the guarantor and in return for something. The two views run very close together. If the directors, in consideration of this guarantee, made an actual agreement to forbear, they really took the agreement in accord and satisfaction of any claims, if there were claims, and beyond that agreed not to

¹ Only so much of the opinion is given as relates to this question.—ED.

prosecute the question whether there were any ; but such an agreement as that need not be in writing. It seems to me there is no magic at all in formalities, and that there would be ample evidence of such an agreement, if this guarantee to the knowledge of both parties was given and accepted upon the understanding that no proceedings should be instituted. But I do not accept the proposition that this guarantee cannot be effectual and supported by consideration unless there is at the moment it was given something to bind the company. If the guarantee were given on the condition and on the contingency that there should be forbearance, and was taken upon that condition, and upon that contingency, and the contingency afterward happened, then the forbearance when given, being at the request expressed or implied of the guarantor, would furnish an implied consideration for the guarantee which had already been given. That is, I think, no new law. In *Oldershaw v. King*¹ there was a guarantee given to the following effect : “ I am aware,” said the guarantor, “ that my uncles, Messrs. J. and J. F. King, stand considerably indebted to you for professional business, and for cash lent and advanced to them, and that it is not in their power to pay you at present, and as in all probability they will become further indebted to you, though I by no means intend that this letter shall create or imply any obligation on your part to increase your claim against them, I am willing to bear you harmless against any loss arising out of the past and future transactions between you and my said uncles to a certain extent, and therefore in consideration of your forbearing to press them for the immediate payment of the debt now due to you, I hereby engage and agree to guarantee you the payment of any sum they may be indebted to you upon the balance of accounts between you at any time during the next six years, to the extent of £1000, whenever called upon by you to pay the same, and after twelve calendar months’ previous notice.” In that case, Erle, J., expressed himself in the following language : “ Looking at the whole letter, and the circumstances under which it was written, and considering the importance of further advances, I come to the conclusion, that the consideration contemplated was, that further advance should be made, and time given by the creditor before he would press for the payment of the existing debt. Though the contract did not bind the creditor to make further advances, or to give time unless he chose to do so, it is clear that if he did make the advances and did give time, that which was contingent at the time when the instrument was written became an absolute and binding con-

¹ 2 H. & N. 399, 517, 520.

tract." The same principle was applied in the case of the Alliance Bank v. Broom.¹ "It appears to me," said the Vice-Chancellor,² "that when the plaintiffs demanded payment of their debt, and, in consequence of that application, the defendant agreed to give certain security, although there was no promise on the part of the plaintiffs to abstain for any certain time from suing for the debt, the effect was, that the plaintiffs did, in effect, give, and the defendant received, the benefit of some degree of forbearance; not, indeed, for any definite time, but, at all events, some extent of forbearance." So it will be sufficient here that the directors did forbear, if their forbearance was at the request expressed or implied of the guarantor and in consequence of his guarantee being given, and it seems to me there is no sort of necessity to discover language of any particular form, or writing of any particular character, embodying the resolution of the directors. We must treat the thing in a business way and draw an inference of fact as to what the real nature of the transaction was as between business men. But an attempt was made to show that the forbearance was worth nothing. Of course forbearance of a non-existing claim would not be forbearance at all. We were referred to the language of the Master of the Rolls in the case of *ex parte* Banner,³ which seems to throw doubt upon the doctrine which has more than once been laid down in the courts of common law, and finally in the well-known case of *Callisher v. Bischoffsheim*.⁴ It seems to me that if an intending litigant *bonâ fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong. It seems to me it is equally a mistake to suppose that it is not sometimes a disadvantage to a man to have to defend an action even if in the end he succeeds in his defence; and I think therefore that the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession. Otherwise you would have to try the whole cause to know if the man had a right to compromise it, and with regard to questions of law it is obvious you could never safely compromise a question of law at all. With regard to the observations of the Master of the Rolls in *ex parte* Banner I should like to point out in respect to *Callisher v. Bischoffs-*

¹ 2 Dr. & Sm. 289.² *Ibid.* 292.³ 17 Ch. D. 480.⁴ Law Rep. 5 Q. B. 449.

sheim in the first place that whatever be the objection taken to the language of the Court in that case, in any point of view the case was rightly decided. The plea there only denied the existence of the debt, and left it on the record undisputed that the debt might have been put forward reasonably as a substantial claim. But with regard to the language of the Court in *Calisher v. Bischoffsheim*¹ I confess it seems to me that the language of Lord Blackburn was correct, that the decision in *Ockford v. Barelli*² was right, and that the language in *Cook v. Wright*³ is equally unimpeachable. When the Master of the Rolls in *ex parte Banner*⁴ says he doubts, if there was really and obviously no cause of action, whether the belief of the parties that there was, would be sufficient ground for a compromise, I agree if by that he means there must be a real cause of action—that is to say, one that is *bonâ fide* and not frivolous or vexatious; but I do not agree if he means by a real cause of action some cause of action which commends itself to the ultimate reasoning of the tribunal which has to consider and determine the case.

In conclusion I only wish to say I have gone through the case at such great length as I have done, because I feel the greatest possible reluctance in differing from my Brother Cotton. I am thankful to think I am only differing from him upon a question of fact, but as I do differ and differ very decidedly upon it, it seemed to me the parties had a right to expect I should give my reasons at full length for so differing, and therefore my observations have been of greater length than they would otherwise have been.

FRY, L.J. There are two questions which arise for decision in this case, one of such being the question which was involved in the previous case of *Bradford Banking Co. v. Briggs & Co.*⁵ North, J., followed that case according to its then position, and I think that we are bound to follow that case in its present position, being a decision of the Court of Appeal. I say that because, although I was party to the decision, I did not express either dissent from or assent to the larger proposition which certainly governs this case. The second question is the one upon which so much difference of opinion has arisen upon the bench.

Now it appears to me that we must consider in the first place what are the allegations made by the parties in this litigation.

The reply in the first place alleged that no consideration was given for the guarantee, and that was met by the rejoinder which stated with precision the consideration upon which the

¹ Law Rep. 5 Q. B. 449.

² 20 W. R. 116.

³ 1 B. & S. 559.

⁴ 17 Ch. D. 480.

⁵ 31 Ch. D. 19.

company relied. [His Lordship then read the rejoinder and continued.] Now it is to be observed the thing relied on is the abandonment and giving up—in fact, the release of the claims of the company and of the individual shareholders. The case which was made was not one of a request for forbearance for a limited time or for any stated time, followed by actual forbearance. In this case we are told, and no doubt accurately, that these pleadings were put in after litigation as to whether the point should be allowed to be raised. They were put in more than a year after the defence was put in, and therefore it is impossible to doubt that the statement in the rejoinder is the well-considered allegation of the company as to the consideration upon which they think themselves entitled to rely.

Now the next inquiry which arises is this, what is the law which bears upon this question; and I am glad to think that whatever difference there may be between us upon other questions there is no difference as to the general principle of law applicable to this case. In my opinion when a real claim has been made and there is a *bonâ fide* compromise, that is sufficient consideration. I think the law was concisely stated in the case of *Cook v. Wright*,¹ when the Court, dealing with the case before them, said: "The real consideration therefore depends, not on the actual commencement of a suit, but on the reality of the claim made and the *bonâ fides* of the compromise." I am quite aware that the Master of the Rolls has expressed certain doubts as to whether there must not be in the mind, I suppose of the Court which ultimately tries the question, a doubt as to the contest between the parties; but I cannot follow the learned Master of the Rolls in that view. I do not think the policy of the Courts is to prevent real *bonâ fide* compromises of real and *bonâ fide* claims. When there is a pending action it is easy to suppose that the giving up of that action is the consideration for the compromise. Again, when there is a real cause of action slight evidence of the claim being made may be admissible, and again, when there is a real belief in a cause of action on both sides slight evidence of the claim being made may go in support of the reality of the claim. But in my judgment none of those circumstances can be laid down as absolutely essential to the validity of a compromise. Of course if neither party believes in the reality of the claim, it is obvious it is a sham. I do not desire to say anything more than that in my judgment when a real claim is made and is *bonâ fide* compromised, that is ample consideration.

Now in the present case was there any real cause of action

¹ B. & S. 559, 570.

or any evidence of belief on the part of the company that there was any cause of action? Or, again, was any claim really made against Mr. Grant by the company? [His Lordship then referred to the evidence on these points and came to the conclusion that there had been no misrepresentation by Grant, no real belief of the company or its officers of any real cause of action against him, and no *bonâ fide* claim on March 15th pending by the company against Grant. His Lordship then continued.] But was there any claim by a shareholder? There is not the slightest trace of that. It is not suggested that any shareholder had been advised to make any claim, or, except the angry words that passed at the meeting, that he had ever asserted a claim; and I am bound to say I do not look upon the angry words which passed upon that occasion as anything serious, as anything indicating a cause of action, or the existence of a belief of a cause of action. But supposing there was this real claim, was there, to use the language of the pleadings, any agreement on the part of the company and the shareholders to put an end to the contemplated proceedings and to give up their claim? Now if there was any such agreement it is very remarkable that the document is absolutely silent about it. It was suggested it would be unpleasant to Mr. Grant to insert words indicating that there was any such claim, but any such sensibility was out of place after the angry discussion which had occurred; and general words might have been inserted which would not wound the sensibility of the most sensitive man, and yet might have the effect of showing that the directors intended to insist upon their rights. But not only is there no mention of it in the agreement itself, there is no mention of it in the minute book which contains the angry discussion. Lastly, it seems to me strange if the company had intended to give up their claims, that no resolution was passed at the meeting to express the desire of the meeting that the company should give them up. I think, therefore, the circumstances of the case are very strong to show that there was no intention whatever on the part of the company to abandon any claim they might have. With regard to the individual shareholders, can it be said that they by being present at the meeting, some of them silent, not taking part in the discussion, were giving up their individual causes of action, supposing they existed? And observe, giving them up while the shareholders who were not at the meeting would retain their causes of action, if they had any. How can it be said therefore that there was any agreement to give up the claims of all the shareholders for whose benefit the agreement was entered into? It seems to me that

there is strong evidence to show that there was no intention on the part of the shareholders to give up their rights. Therefore, looking at the circumstances of the case it appears to me impossible to conclude that the shareholders intended to give up anything, or that the company intended to give up anything. But then it is said that Mr. Redmayne's affidavit is precise, and that as Mr. Redmayne was not cross-examined it is impossible for this Court to come to a conclusion different from that of North, J. Now I confess that has been to my mind the principal question of difficulty in this case, and I should have been better pleased if Mr. Redmayne had been cross-examined. At the same time it must be borne in mind that the onus of proof is on those who make an assertion. I do not impute bad faith to Mr. Redmayne, but his statements are not literally accurate. [His Lordship then referred to this affidavit, and came to the conclusion that it did not contain statements of fact sufficient to support the contention that has been made. He then continued.]

Now another difficulty which must be referred to is this, that the abandonment of claims mentioned in the affidavit by the company is their abandonment, if any such there was, by an incorporated society, a body whose proceedings are regulated by the requirements of the Companies Act, and who must proceed with a certain amount of regularity and formality. It is to be observed, as I have already said, there is no document on the part of the company indicating any intention to give up their claim. There appears to have been no resolution of the directors to give it up, there is no discussion as to whether they shall give it up, there is no resolution at the meeting of March 15th as to whether they shall give it up; and that to my mind is strong to show that there was no intention to give it up. I think, therefore, it is impossible that the company can be bound by such an irregular discussion as seems to have taken place on March 15th. Lastly, it has been urged upon us that the conduct of both the parties showed they thought that the consideration was sufficient. It is said that Mr. Grant treated his undertaking as serious. If he was a man of honor he would have treated it seriously; in all probability if his affairs had not gone into liquidation he intended to honor, and would have honored that undertaking, which, whatever its legal force, was binding upon him in honor. I think the true result of the evidence is to show that there was an expectation in the mind of Mr. Grant that if he gave this document no proceedings would be taken against him, that there was an expectation in the minds of many of those who were present, if they got this dividend they would

take no proceedings ; but it appears to me it is not right or competent for the Court to turn an expectation into a contract, and that is what I think we should do if we gave effect to this as a valid contract.

The result is the majority of the Court, while differing from the judge on both the points, affirms the decree.

Their Lordships then made a declaration that the plaintiff was entitled to a charge upon the shares of Grant, free from any claim by the defendant company under the letter of guarantee of March 15th, 1883, and dismissed the appeal with costs.

CREARS v. HUNTER.

IN THE COURT OF APPEAL, JULY 12, 1887.

[*Reported in Law Reports, 19 Queen's Bench Division, 341.*]

APPEAL from the order of the Queen's Bench Division (Day and Wills, JJ.) setting aside the verdict and judgment for the plaintiff at the trial.

The facts in substance appeared to be as follows :

The action was on a promissory note, the defence being that there was no consideration for the making of the note by the defendant.

The defendant's father,¹ since deceased, had, before the defendant came of age, borrowed the sum of £200 from the plaintiff, promising that his son, the defendant, when of age, would become surety for the debt. In 1877, the defendant being then of age, the plaintiff brought a promissory note stamp to the defendant's father's house, where the defendant then was, and the promissory note now sued upon was then drawn up and signed by the defendant's father and the defendant. By such note they jointly and severally promised to pay to the plaintiff or order "the sum of £200, being money lent, with interest on the same from Martinmas last past half-yearly at the rate of 5 per cent per annum." There was no evidence as to anything being said by the parties in relation to the signing of the note. Interest had been paid upon the note. It appeared that on several occasions such interest was paid in the defendant's presence, and the receipts for such payments of interest were made out to the defendant's father and the defendant jointly. The

¹ The executor of the father was joined as a defendant in the action, but had put in no defence ; and for convenience' sake the son is referred to throughout the report as if he had been the sole defendant.

principal being still due, the plaintiff brought his action on the note against the defendant Hunter and his father's executor.

The learned judge at the trial, A. L. Smith, J., appeared, in substance, to have told the jury that, if the note was signed by the defendant in order that the plaintiff might give time to his father, and the plaintiff did give time, there would be a good consideration for the making of the note by the defendant, and he left it to the jury to say whether there was such consideration.

The jury found for the plaintiff.

The Divisional Court set aside the verdict on the ground that there was no evidence of consideration, and entered judgment for the defendant.

French, Q.C., and *Mattinson* for the plaintiff.

Gully, Q.C., and *Henry* for the defendant.

LORD ESHER, M.R. In this case the defendant's father had borrowed money of the plaintiff, and was actually liable to pay the amount so borrowed. The plaintiff purchased a promissory note stamp and went with it to the house of the defendant's father, and there found the defendant's father, and the defendant, who was at that time under no obligation whatever to the plaintiff. A promissory note was drawn up, which does not, it is true, on the face of it provide for any delay in payment of the amount due by the father, because the father's liability on the note arose immediately after it was signed, if the plaintiff had chosen to sue on it. The note does nevertheless indicate on the face of it that, though there was no binding agreement to forbear, the parties did contemplate that the note might not be sued on for some time, because provision is made for the payment of interest half-yearly by the son jointly with the father. It may be true that there was no evidence of any request in express terms by the son that the plaintiff would forbear to sue the father, but what was the substance of the transaction contemplated in the minds of the parties? Was not the understanding obviously that, if the plaintiff would forbear to sue the father, the defendant would become liable on the note? I take it to be undoubted law that the mere fact of forbearance would not be a consideration for a person's becoming surety for a debt. It is quite clear, on the other hand, that a binding promise to forbear would be a good consideration for a guarantee. The question is whether, if the guarantor requests the creditor to forbear from suing and the creditor on such request, although he does not at the time bind himself to forbear, does in fact afterward forbear to sue, there is a good consideration for the guarantee. It seems to me that it was laid down in

*Oldershaw v. King*¹ that there would in such a case be a good consideration, and I do not think that any of the cases cited to us is really to the contrary. Erle, J., there said: "Looking at the whole letter and the circumstances under which it was written, and considering the importance of further advances, I come to the conclusion that the consideration contemplated was that further advances should be made and time given by the creditor before he would press for payment of the existing debt. Though the contract did not bind the creditor to make further advances or to give time, unless he chose to do so, it is clear that, if he did make the advances and did give time, that which was contingent at the time when the instrument was written became an absolute and binding contract." It clearly follows from what he there says that, if at the request of the guarantor the creditor does in fact forbear, there is a sufficient consideration to bind the guarantor, who has promised to pay the debt. It was argued that the request to forbear must be express. But it seems to me that the question whether the request is express or is to be inferred from the circumstances is a mere question of evidence. If a request is to be implied from the circumstances, it is the same as if there were an express request. The question is, therefore, whether there was sufficient evidence in this case to entitle the jury to infer that the understanding between the plaintiff and defendant was that, if the plaintiff would give time to the father, the defendant would make himself responsible. I am of opinion that there was evidence to go to the jury that what the parties really understood in their minds was that, if the plaintiff would give the defendant's father time to turn round, the defendant would guarantee the payment of the principal in the end and in the mean time interest at the rate of 5 per cent per annum half-yearly. I not only think that there was evidence of such an understanding, but I entirely agree with the inference drawn by the jury. I cannot see any other reasonable explanation of the transaction than that the understanding was as I have said. For these reasons I think that the verdict and judgment at the trial were right, and that the decision of the Divisional Court must be reversed.

LINDLEY, L.J. I am of the same opinion. In this case the plaintiff obtained a verdict in an action on a promissory note, the question left to the jury being whether there was any consideration for the defendant's giving the note. The Divisional Court have set aside the verdict and entered judgment for the defendant on the ground that there was no evidence of any con-

¹ 2 H. & N. 399, 517.

sideration. We therefore have to consider whether there was any evidence of a good consideration for the signature of the note by the defendant. Looking at the document and the history of the transaction, I cannot invent any rational theory by which to account for the defendant's giving the note except that it was for the purpose of benefiting his father by procuring for him time to pay the debt. To say otherwise appears to me inconsistent with human nature and the whole character of the transaction. It may be that there is no evidence that the defendant actually said that he would be liable, if the plaintiff would give his father time. But, except on the theory that such was the understanding between the parties, the defendant's conduct is inexplicable. I cannot think that there was no evidence for the jury that there was forbearance by the plaintiff at the request of the defendant. On the contrary, the evidence to the effect that there was seems to me overwhelming. Then the question arises whether that would constitute a sufficient consideration. Upon looking into the authorities it seems to me to be the result of other cases besides *Oldershaw v. King*¹ and *Mills v. New Zealand Alford Estate Company*,² that it is not essential that the plaintiff should have agreed to forbear; it is quite sufficient if he did forbear at the request of the defendant. It is argued that in thus deciding we contravene the decision in the case of *Crofts v. Beale*.³ But I do not so read that case. There the question was left to the jury whether there was consideration or not, the judge having told them that, if the note was given to prevent legal proceedings against the principal debtor, there was sufficient consideration for it. The jury found for the defendant—*i.e.*, that there had been no request and no consideration. In this case the jury found that there was consideration.

LOPES, L.J. In this case the question is whether there was evidence of a consideration for the making of this note by the defendant. The law appears to be that a promise to forbear is a good consideration, but also that actual forbearance at the request, express or implied, of the defendant would be a good consideration. Taking the latter of these two alternatives, it is undisputed that there was actual forbearance from suing in this case. That by itself would not be sufficient; such forbearance must have been at the request, express or implied, of the defendant. There is no evidence here of any express request. It seems, however, clear that there is evidence of an implied request, and I think the jury were justified in finding that there was such a request. Unless it were to procure forbearance, it

¹ 2 H. & N. 517.² 32 Ch. D. 266³ 11 C. B. 172.

is inconceivable why the defendant should have signed the note at all. The case is strengthened when it is borne in mind that the note provides for the payment of interest half-yearly by the father and son jointly, thus clearly indicating to my mind that forbearance was contemplated at the request of the son. For these reasons I think the judgment of the Court below should be reversed.

Appeal allowed.

THE TRADERS' NATIONAL BANK, OF SAN ANTONIO,
TEXAS, RESPONDENT, v. CHARLES T. PARKER,
APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, JANUARY 20, 1892.

[*Reported in 130 New York Reports 415.*]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 24th, 1890, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

David Wilcox for appellant.

John Lindley for respondent.

BROWN, J. On or about February 11th, 1884, the plaintiff was the owner and holder of an overdue promissory note for \$10,265.65, made by one J. P. Hodgson and one F. W. James, and was insisting upon the payment thereof and threatening to bring suit thereon against the makers. The defendant thereupon, with a view to obtain an extension of time for the payment of said note, affixed his signature thereto under the signatures of Hodgson and James.¹

This action is upon the contract thus made, and the defence relied upon in this Court to defeat a recovery is that no consideration for the defendant's contract was shown.

The referee found that the consideration consisted in the plaintiff's agreement to extend the time of payment of said note, and to delay proceedings for the collection thereof, but that it did not state or agree to extend for any definite period of time; and upon defendant's request he further found that "when the defendant signed the note in suit plaintiff did not waive its right to sue Hodgson and James, or either of them, upon the same whenever it saw fit."

¹ See *supra*, p. 1, note 1.—ED.

If the latter conclusion is to be treated as one of fact, it is clearly in conflict with the other findings, as an agreement to extend the time of payment, which did not bind the plaintiff to withhold suit for some time, would be no agreement at all, and the defendant would be entitled to the benefit of the rule that when findings are so inconsistent that they cannot be reconciled, those which are most favorable to the appellant are controlling upon the Appellate Court. (*Redfield v. Redfield*, 110 N. Y. 671; *Wahl v. Barnum*, 116 N. Y. 87-99.)

But it is the duty of the Court, if possible, to reconcile these findings. It is only when this cannot, by reasonable construction, be accomplished, that it is bound to accept the finding most favorable to the appellant. (*Green v. Roworth*, 113 N. Y. 462.)

The findings of the referee, taken together, are to the effect that while the plaintiff was to delay proceedings for collection of the note, and the defendant put his signature to it in consideration of the agreement of the plaintiff to give the makers further time upon the note, the plaintiff did not state or agree that it would extend for any definite time, nor did it waive its right to sue the makers, Hodgson and James, or either of them, upon the note whenever it saw fit. The latter findings were pursuant to request of the defendant, and the last one seems to import the effect of the former as the referee understood it. In that view the others represent the agreement as made between the parties, and the last one without qualification of their terms embraces what the referee seems to treat as the interpretation to which in his view they were entitled. While this does not seem quite consistent with the conclusion of law reached by the referee, it is not necessarily inconsistent with the agreement between the parties as found by him. And, therefore, does not control the construction and effect to be given to those findings in support of the judgment.

While all the evidence taken upon the trial is not before us, there is a certificate in the record that the "case contains so much of the evidence as is material to the questions to be raised," and we may presume, therefore, that all the evidence bearing upon the question of consideration is in the case. Referring to the testimony, we find that the defendant was a creditor of Hodgson, one of the makers of the note. Hodgson was embarrassed financially, and other creditors were pressing their claims against him. He was the owner of a herd of 13,000 sheep which were about to be sold at Colorado City, under a chattel mortgage. The defendant desired to purchase the sheep at the sale, and wanted to borrow the money from the plaintiff

to enable him to do so, and to have the proceedings for the collection of the note withheld. With this object in view he visited the plaintiff at San Antonio with James, the joint maker of the note. The plaintiff refused to make the desired loan, but it offered to extend the time for the payment of its note if the defendant would sign it.

Mr. Brownson, the president of the plaintiff bank, testified that he agreed to withhold suit on the note and extend the time of payment. Asked as to the time of the extension he said: "I don't think any definite time was agreed upon; it was to depend very much upon the movements of the other creditors of Hodgson. The proceedings at Colorado City were to cut some figure in what we were to do; it was left somewhat to the wishes of Mr. Parker."

And it appeared that Parker thought that something on the plaintiff's debt might be realized out of the sale of the sheep, and that he was to go to Colorado City, which was about eighteen hours' ride by railroad from San Antonio, and attend the sale, and that it was contemplated by the parties that he should advise the plaintiff from that place, and that he did so, and that Mr. Brownson went there at his request, but he refused to advance money to buy the sheep.

Mr. Thornton, the cashier of the bank, testified that they were pressing Hodgson for a settlement, and threatened him with suit. That it was about term time of the Court, and they had threatened to put the paper through at that term, . . . and the proposition was made that if the bank was satisfied on the paper it would withhold suit. It thus appears that nothing was said about the right of the plaintiff to sue whenever it saw fit, and the conclusion of the referee that the plaintiff did not waive its rights is an inference from the evidence, and was not an existing or independent fact itself, and, as was said in *Green v. Roworth (supra)*, "it was in that respect rather a finding upon a question of law than one of fact." It certainly was the intention and agreement of the parties that sufficient time should be allowed by the bank during which the defendant could go to Colorado City and examine into the condition of Hodgson's affairs there, so that he might judge of the possibility of realizing something out of the sale of the sheep that could be applied to the payment of the plaintiff's note, and this was a matter of considerable importance and benefit to him. And it is clear, I think, that suit was to be withheld upon the note until after the sale at Colorado City, and whether further extension should be given was to depend somewhat upon the defendant's wishes in the matter.

The period during which suit was to be withheld was not fixed at any certain number of days, weeks or months, but it does not follow that the plaintiff did not waive its right to sue immediately on the note, and the evidence leaves no doubt that it did waive such right until the defendant could go to Colorado City, and there make such examination as he desired and communicate the result to the plaintiff, and any prosecution upon the note during that time would have been a plain violation of plaintiff's agreement. Treating the finding I have quoted as an inference from the facts proven, and not as a distinct fact of itself, we have no difficulty in affirming the judgment upon the facts found by the referee.

The appellant contends that because the plaintiff did not agree to extend the time of payment for a definite period, there was no consideration for defendant's contract, and he cites *Atlantic Nat. Bank v. Franklin* (55 N. Y. 235) and *Perkins v. Proud* (62 Barb. 420) as authorities for that contention.

In the *Atlantic Bank Case* there was no agreement not to sue. The evidence showed indulgence merely. In *Perkins v. Proud*, the Court said, to make forbearance a valid consideration, there must be a binding agreement to forbear either for a definite time or for a reasonable time.

Neither of these cases support the appellant's claim. On the contrary, the whole current of authority is to the effect that an agreement to withhold suit is a good consideration to support a promise to pay a debt, although no fixed and definite time is expressly agreed upon. (Rolles Abgt. 27, pl. 45; Brandt on Suretyship and Guaranty, § 8; 1 Parsons on Contracts [6th ed.], p. 444; Walker v. Sherman, 11 Metc. 170-172; Mecorney v. Stanley, 8 Cush. 85-88; Hakes v. Hotchkiss, 23 Vt. 231; Calkins v. Chandler, 36 Mich. 320; Lonsdale v. Brown, 4 Wash. 148; Downing v. Funk, 5 Rawle, 69; Sidwell v. Evans, 1 Penn. 383; King v. Upton, 4 Me. 387; Elting v. Vanderlyn, 4 Johns. 237; Watson v. Randall, 20 Wend. 201; Mut. Life Ins. Co. v. Smith, 23 Hun, 535.)

The legal effect of such an agreement is to bind the creditor to withhold suit for a reasonable time. What would be a reasonable time, if not always a question of fact, would at least be a mixed question of law and fact, depending for its solution upon the circumstances of each case.

The precise question at issue here was decided in this state in *Elting v. Vanderlyn* (*supra*). There the judgment was attacked on the ground that the promise to pay was in consideration of an indefinite forbearance, and was void. The Court said: "The consideration of forbearance generally is sufficient

without setting forth a specific time. There was in fact a total forbearance for a long time, which brings the case within that of *Mapes v. Sidney* (Cro. Jac. 283)." This case has never been questioned or overruled.

In the case before us there was total forbearance, as no suit was ever brought against Hodgson or James on the note.

The general rule is that the waiver of any legal right, at the request of another party, is a sufficient consideration to uphold a promise.

There was clearly such a waiver shown in this case, and the referee having found an express agreement to that effect, judgment in the plaintiff's favor necessarily followed.

The judgment should be affirmed.

All concur, except FOLLETT, C.J., and VANN, J., dissenting.
Judgment affirmed.

BENJAMIN B. STRONG, APPELLANT, v. LOUISA A.
SHEFFIELD, RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, JANUARY 15, 1895.

[Reported in 144 *New York Reports* 392.]

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 12th, 1892, which reversed a judgment in favor of defendant, entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This was an action upon a promissory note.

The facts, so far as material, are stated in the opinion.

Cornelius E. Kene for appellant.

Martin J. Keogh for respondent.

ANDREWS, C.J. The contract between a maker or endorser of a promissory note and the payee forms no exception to the general rule that a promise, not supported by a consideration, is *nudum pactum*. The law governing commercial paper which precludes an inquiry into the consideration as against *bonâ fide* holders for value before maturity, has no application where the suit is between the original parties to the instrument. It is undisputed that the demand note upon which the action was brought was made by the husband of the defendant and endorsed by her at his request and delivered to the plaintiff, the payee, as security for an antecedent debt owing by the husband to the plaintiff. The debt of the husband was past due at the

time, and the only consideration for the wife's endorsement, which is or can be claimed, is that as part of the transaction there was an agreement by the plaintiff when the note was given to forbear the collection of the debt, or a request for forbearance, which was followed by forbearance for a period of about two years subsequent to the giving of the note. There is no doubt that an agreement by the creditor to forbear the collection of a debt presently due is a good consideration for an absolute or conditional promise of a third person to pay the debt, or for any obligation he may assume in respect thereto. Nor is it essential that the creditor should bind himself at the time to forbear collection or to give time. If he is requested by his debtor to extend the time, and a third person undertakes in consideration of forbearance being given to become liable as surety or otherwise, and the creditor does in fact forbear in reliance upon the undertaking, although he enters into no enforceable agreement to do so, his acquiescence in the request, and an actual forbearance in consequence thereof for a reasonable time, furnishes a good consideration for the collateral undertaking. In other words, a request followed by performance is sufficient, and mutual promises at the time are not essential, unless it was the understanding that the promisor was not to be bound, except on condition that the other party entered into an immediate and reciprocal obligation to do the thing requested. (*Morton v. Burn*, 7 A. & E. 19; *Wilby v. Elgee*, L. R., 10 C. P. 497; *King v. Upton*, 4 Maine, 387; *Leake on Con.*, p. 54; *Am. Lead Cas.*, Vol. II., p. 96 *et seq.* and cases cited.) The general rule is clearly, and in the main accurately, stated in the note to *Forth v. Stanton* (1 Saund. 210, note *b*). The learned reporter says: "And in all cases of forbearance to sue, such forbearance must be either absolute or for a definite time, or for a reasonable time; forbearance for a little, or for some time, is not sufficient." The only qualification to be made is that in the absence of a specified time a reasonable time is held to be intended. (*Oldershaw v. King*, 2 H. & N. 517; *Calkins v. Chandler*, 36 Mich. 320.) The note in question did not in law extend the payment of the debt. It was payable on demand, and although being payable with interest it was in form consistent with an intention that payment should not be immediately demanded, yet there was nothing on its face to prevent an immediate suit on the note against the maker or to recover the original debt. (*Merritt v. Todd*, 23 N. Y. 28; *Shutts v. Fingar*, 100 N. Y. 539.)

In the present case the agreement made is not left to inference, nor was it a case of request to forbear, followed by for-

bearance, in pursuance of the request, without any promise on the part of the creditor at the time. The plaintiff testified that there was an express agreement on his part to the effect that he would not pay the note away, nor put it in any bank for collection, but (using the words of the plaintiff) "I will hold it until such time as I want my money, I will make a demand on you for it." And again: "No, I will keep it until such time as I want it." Upon this alleged agreement the defendant endorsed the note. It would have been no violation of the plaintiff's promise if, immediately on receiving the note, he had commenced suit upon it. Such a suit would have been an assertion that he wanted the money and would have fulfilled the condition of forbearance. The debtor and the defendant, when they became parties to the note, may have had the hope or expectation that forbearance would follow, and there was forbearance in fact. But there was no agreement to forbear for a fixed time or for a reasonable time, but an agreement to forbear for such time as the plaintiff should elect. The consideration is to be tested by the agreement, and not by what was done under it. It was a case of mutual promises, and so intended. We think the evidence failed to disclose any consideration for the defendant's endorsement, and that the trial Court erred in refusing so to rule.

The order of the General Term reversing the judgment should be affirmed, and judgment absolute directed for the defendant on the stipulation with costs in all courts.

All concur, except GRAY and BARTLETT, JJ., not voting, and HAIGHT, J., not sitting.

Ordered accordingly. _____

(g) *Antecedent act or agreement as a consideration.*

HUNT v. BATE.

IN THE COMMON PLEAS, EASTER TERM, 1568.

[Reported in *Dyer* 272.]

THE servant of a man was arrested and imprisoned in the Compter in London for a trespass, and he was let to mainprise by the manucaption of two citizens of London (who were well acquainted with the master), in consideration that the business of the master should not go undone. And afterward, before judgment and condemnation, the master upon the said friendly consideration promised and undertook to one of the mainpennors

to save him harmless against the party plaintiff from all damages and costs if any should be adjudged, as happened afterward in reality ; whereupon the surety was compelled to pay the condemnation, s. £31, etc. And thereupon he brought an action on the case, and the undertaking was traversed by the master, and found in London at *nisi prius* against him. And now in arrest of judgment it was moved that the action does not lie. And by the opinion of the Court it does not lie in this matter, because there is no consideration wherefore the defendant should be charged for the debt of his servant, unless the master had first promised to discharge the plaintiff before the enlargement, and mainprise made of his servant, for the master did never make request to the plaintiff for his servant to do so much, but he did it of his own head, wherefore, etc.

But in another like action on the case brought upon a promise of £20 made to the plaintiff by the defendant in consideration that the plaintiff, at the special instance of the said defendant, had taken to wife the cousin of the defendant, that was good cause, although the marriage was executed and past before the undertaking and promise, because the marriage ensued the request of the defendant. And land may be also given in frank-marriage with the cousin of the donor as well after the marriage as before, because the marriage may be intended the cause, etc. And therefore the opinion of the Court in this case this term was that the plaintiff should recover upon the verdict, etc. And so note the diversity between the aforesaid cases.

SIDENHAM AND WORLINGTON'S CASE.

IN THE COMMON PLEAS, EASTER TERM, 1585.

[*Reported in Leonard, 224.*]

IN an action upon the case upon a promise, the plaintiff declared that he, at the request of the defendant, was surety and bail for J. S., who was arrested into the King's Bench, upon an action of £30, and that afterward, for the default of J. S., he was constrained to pay the £30, after which, the defendant meeting with the plaintiff, promised him for the same consideration that he would repay that £30 which he did not pay, upon which the plaintiff brought the action ; the defendant pleaded *non assumpsit*, upon which issue was joined, which was found for the plaintiff. Walmesley for the defendant moved, the

Court, that this consideration will not maintain the action, because the consideration and promise did not concur and go together ; for the consideration was long before executed, so as now it cannot be intended that the promise was for the same consideration. As if one giveth me a horse, and a month after I promise him £10 for the said horse, he shall never have debt for the £10 nor *assumpsit* upon that promise, for there it is neither contract nor consideration, because the same is executed. Anderson. This action will not lie, for it is but a bare agreement and *nudum pactum*, because the contract was determined, and not *in esse* at the time of the promise ; but he said it is otherwise upon a consideration of marriage of one of his cousins, for marriage is always a present consideration. Windham agreed with Anderson, and he put the case in 3 H. 7. If one selleth a horse unto another, and at another day he will warrant him to be sound of limb and member, it is a void warrant, for that such warranty ought to have been made or given at such time as the horse was sold. Periam, J., conceived that the action did well lie, and he said that this case is not like unto the cases which have been put of the other side ; for there is a great difference betwixt contracts and this case, for in contracts upon sale the consideration and the promise and the sale ought to meet together, for a contract is derived from *con* and *trahere*, which is a drawing together, so as in contracts everything which is requisite ought to concur and meet together—viz., the consideration of the one side and the sale or the promise on the other side. But to maintain an action upon an *assumpsit*, the same is not requisite, for it is sufficient if there be a moving cause or consideration precedent, for which cause or consideration the promise was made, and such is the common practice at this day. For in an action upon the case, upon a promise, the declaration is laid that the defendant for, and in consideration of £20 to him paid (*postea scil.*) that is to say, at a day after *super se assumpsit*, and that is good ; and yet there the consideration is laid to be executed. And he said that the case in Dyer, 10 Eliz. 272, would prove the case, for there the case was that the apprentice of one Hunt was arrested when his master Hunt was in the country, and one Baker, one of the neighbors of Hunt, to keep the said apprentice out of prison, became his bail, and paid the debt ; afterward Hunt, the master, returning out of the country, thanked Baker for his neighborly kindness to his apprentice, and promised him that he would repay him the sum which he had paid for his servant and apprentice. And afterward upon that promise Baker brought an action upon the case against Hunt, and it was adjudged in that case that the action

would not lie, because the consideration was precedent to the promise, but because it was executed and determined long before. But in that case it was holden by all the justices that if Hunt had requested Baker to have been surety or bail, and afterward Hunt had made the promise for the same consideration, the same had been good, for that the consideration did precede, and was at the instance and request of the defendant. Rhodes, J., agreed with Periam, and he said that if one serve me for a year, and hath nothing for his service, and afterward, at the end of the year, I promise him £20 for his good and faithful service ended, he may have and maintain an action upon the case upon the same promise, for it is made upon a good consideration ; but if a servant hath wages given him, and his master *ex abundanti* doth promise him £10 more after his service ended, he shall not maintain an action for that £10 upon the said promise, for there is not any new cause or consideration preceding the promise, which difference was agreed by all the justices, and afterward, upon good and long advice, and consideration had of the principal case, judgment was given for the plaintiff, and they much relied upon the case of Hunt and Baker, 10 Eliz. Dyer, 272. See the case there.

DOCKET v. VOYEL.

IN THE COMMON PLEAS, EASTER TERM, 1602

[*Reported in Croke, Elizabeth, 885.*]

ASSUMPSIT. Whereas the defendant, May 10th, 40 Eliz., in consideration that the plaintiff, at a certain day then past, at the defendant's request, had lent unto him £30 for such a time ; that the defendant assumed to lend unto the plaintiff upon request £30 for a year or otherwise to give him 40s. The plaintiff alleged that the defendant did not lend him £30 *licet requisitus*, etc., nor pay the said 40s. And it was thereupon demurred, because the consideration was past and executed, and the consideration and promise ought to go together, or else it ought to be a consideration continuing. Wherefore for this cause it was adjudged for the defendant.

LAMPLEIGH v. BRATHWAIT.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1615.

[Reported in Hobart 105.]

ANTHONY LAMPLEIGH brought an *assumpsit* against Thomas Brathwait, and declared, that whereas the defendant had feloniously slain one Patrick Mahume, the defendant after the said felony done, instantly required the plaintiff to labor, and do his endeavor to obtain his pardon from the king. Whereupon the plaintiff upon the same request did, by all the means he could and many days' labor, do his endeavor to obtain the king's pardon for the said felony—viz., in riding and journeying at his own charges from London to Roiston when the king was there, and to London back, and so to and from Newmarket, to obtain pardon for the defendant for the said felony. Afterward *scil.*, etc., in consideration of the premises, the said defendant did promise the said plaintiff to give him £100, and that he had not, etc., to his damage £120.

To this the defendant pleaded *non assumpsit*, and found for the plaintiff damage £100. It was said in arrest of judgment that the consideration was passed.

But the chief objection was that it doth not appear, that he did anything toward the obtaining of the pardon, but riding up and down, and nothing done when he came there. And of this opinion was my Brother Warburton, but myself and the other two judges were of opinion for the plaintiff, and so he had judgment.

First, it was agreed that a mere voluntary courtesy will not have a consideration to uphold an *assumpsit*. But if that courtesy were moved by a suit or request of the party that gives the *assumpsit*, it will bind, for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference. Pasch. 10 Eliz. Dyer, 272; Hunt and Bates. See Oneley's Case, 19 Eliz. Dyer, 355.

Then to the main point it is first clear that in this case upon the issue *non assumpsit* all these points were to be proved by the plaintiff.

1. That the defendant had committed the felony, *prout*, etc.
2. Then that he requested the plaintiff's endeavor, *prout*, etc.
3. That thereupon the defendant made his proof, *prout*, etc.
4. That thereupon the defendant made his promise, *prout*, etc.

For wheresoever I build my promise upon a thing done at my request, the execution of the act must pursue the request, for it is like a case of commission for this purpose.

So then the issue found *ut supra* is a proof that he did his endeavor, according to the request, for else the issue could not have been found, for that is the difference between a promise upon a consideration executed and executory, that in the executed you cannot traverse the consideration by itself, because it is passed and incorporated and coupled with the promise. And if it were not indeed then acted, it is *nudum pactum*.

But if it be executory, as in consideration, that you shall serve me a year, I will give you £10; here you cannot bring your action till the service performed. But if it were a promise on either side executory, it needs not to aver performance, for it is the counter-promise, and not the performance that makes the consideration, yet it is a promise before, though not binding, and in the action you shall lay the promise as it was and make special averment of the service done after.

Now if the service were not done, and yet the promise made, *prout*, etc., the defendant must not traverse the promise, but he must traverse the performance of the service, because they are distinct in fact, though they must concur to the bearing of the action.

Then also note here that it was neither required nor promised to obtain the pardon, but to do his endeavor to obtain it, the one was his end and the other his office.

Now then he hath laid expressly in general that he did his endeavor to obtain it—viz., *in equitando*, etc., to obtain. Now, then, clearly the substance of this plea is general, for that answers directly the request, the special assigned is but to inform the Court; and therefore clearly, if upon the trial he could have proved no riding, nor journeying, yet any other effectual endeavor according to the request would have served, and therefore if the consideration had been that he should endeavor in the future, so that he must have laid his endeavor expressly, and had done it as he doth here, and the defendant had not denied the promise, but the endeavor, he must have traversed the endeavor in the general, not the riding, etc., in the special; which proves clearly that is not the substance, and that the other endeavor would serve. This makes it clear that though particulars ought to be set forth to the Court, and those sufficient, which were not done, which might be cause of demurrer, yet being but matter of form, and the substance in the general, which is here in the issue and verdict, it were cured by the verdict. But the special is also well enough, for all is laid down for

the obtaining of the pardon which is within the request ; and therefore suppose he had ridden to that purpose, and Brathwait had died, or himself, before he could do anything else, or that another had obtained the pardon before or the like, yet the promise had holden.

And observe that case 22 E. 4, 40, condition of an obligation to show a sufficient discharge of an annuity, you must plead the certainty of the discharge to the Court ; the reason whereof given by Brion and Choke is that the plea there contains two parts, one a trial *per pais*, *scil.*, the writing of the discharge, the other by the Court, *scil.* the sufficiency and validity of it, which the jury could not try, for they agree that if the condition had been to build a house agreeable to the state of the obligee, because it was a case all proper for the country to try, it might have been pleaded generally, and then it was a demurrer, not an issue, as is here.

HOPKINS AND WIFE v. LOGAN.

IN THE EXCHEQUER, EASTER TERM, 1839.

[*Reported in 5 Meeson & Welsby 241.*]

ASSUMPSIT. The declaration stated that after the intermarriage of the plaintiffs, and before the commencement of this suit, to wit, on October 1st, 1838, at the request of the defendant, an account was stated by and between the said Richard Hopkins, for and on behalf of himself and his said wife Ellen, on the one part, and the defendant on the other part, of and concerning certain moneys, amounting to a large sum of money, to wit, the sum of £1000, by the said Ellen, while she was unmarried, lent and advanced to the defendant at his request, and remaining unpaid before, at, and after the time of the said intermarriage, and of and concerning certain other moneys, amounting in the whole to a large sum of money, to wit, to the sum of £555 3s. 11d., by the defendant before the stating of the said account paid to the plaintiff ; and which said last-mentioned moneys the said plaintiff, Richard Hopkins, for and on behalf of himself and his said wife, at the time of the said stating of the said account, and at the request of the defendant, agreed should be taken and considered as satisfying and discharging so much of the said first-mentioned sum of money ; and upon the account so stated as aforesaid, the defendant was then found to be and then was in arrear and indebted to the

plaintiff in a large sum of money, to wit, the sum of £444 16s. 1d., residue of the said first-mentioned sum of money ; and being so found in arrear and indebted as aforesaid, the defendant, in consideration of the premises, promised the plaintiffs to pay them the said last-mentioned sum of money on October 10th then next ensuing, which period had elapsed before the commencement of this suit. Breach, in non-payment of the last-mentioned sum of money.

Pleas, first, that the said sum of £1000 in the declaration mentioned was secured to the said Ellen Hopkins before her said intermarriage, by a certain bond or writing obligatory sealed with the seal of the said defendant, and, to wit, on April 6th, 1836, given by the said defendant to the said Ellen Hopkins before the said intermarriage, at the request of the said Ellen Hopkins, for and on account of the said £1000 ; and that the said Ellen Hopkins before her said intermarriage, to wit, on April 6th, 1836, took, accepted, and received the said bond or writing obligatory of and from the defendant, for and on account of the said debt, and in lieu, stead, satisfaction, and discharge of the same ; and that by the said bond or writing obligatory the said defendant, to wit, then became bound to the said Ellen Hopkins, then Ellen Logan, in the penal sum of £2000, subject to a certain condition thereunder written, by which the payment of the said sum of £1000 was to take place and be made by the defendant to the said Ellen Hopkins on April 6th, which will be in the year 1840 ; and that the account of the declaration mentioned, as far as regards the said sum of £1000 therein mentioned, was stated of and concerning the said sum of £1000 so secured, and for which the said bond or writing obligatory had been given and accepted as aforesaid, and of and concerning the money supposed at the time of the said account to be due on the said bond ; whereas no part of the said sum of £1000 was then due or payable upon the said bond, and so the said account was stated erroneously and in mistake. Verification.

Special demurrer and joinder in demurrer.

J. Henderson in support of the demurrer.

Crompton, contra.

LORD ABINGER, C.B. I am of opinion that this declaration is bad, for that the contract declared upon is not binding on both parties, the consideration being executed upon which the new promise is attempted to be founded. The promise, it is true, proceeds both on the accounting and on the payment of the £555 by the defendant ; but both those considerations are executed. The liability of the defendant on the account stated,

would be to pay the amount on request ; to render him liable on the promise here alleged, to pay on a future day, there ought to be some new consideration. I think it is also questionable, whether enough appears upon the allegations in the declaration to found *any* promise, inasmuch as there is no direct statement that the money was due at the time of the accounting ; and I am not prepared to say that the omission of the words " then due " is immaterial. Again, it appears that the £555 has been paid *to the plaintiffs*, which imports a payment to the husband ; but this must be on the wife's account, and, as far as appears, in part of the £1000 due to her ; if so, this payment only leaves the rest of the debt to stand as it did originally, and can therefore furnish no consideration for the defendant's agreement.

As to the plea, I am inclined to think it good, but it is unnecessary to decide upon it.

PARKE, B. I concur in thinking that the judgment must be for the defendant. If it were necessary to decide upon the validity of the plea, I should be inclined to say that it is bad ; but, as the Court are agreed that the declaration cannot be supported, it is not necessary to pronounce upon the sufficiency of the plea. If the declaration were upon an account stated *merely*, and concluded with the promise implied by law, the action would be properly brought by both husband and wife, for the nature of the debt would not be changed. But there are several fatal objections to the declaration as it stands ; first, that this is not an account really stated, because it is not shown that any money was then in arrear ; and the subsequent averment does not supply the defect, because there is no foundation laid for the accounting ; second, the promise as laid cannot be supported, because there is no consideration for any promise different from that which the law implies. The promise which arises in law upon an account stated, is to pay on request, and any other promise is *nudum pactum*, unless made upon a new consideration. At the time of the alleged promise, the party is liable to pay *in præsentî* on request, and if, by a simple promise, without fresh consideration, there can be a contract for future payment, the Statute of Limitations may be defeated by a mere verbal promise. Any promise to pay money *in futuro*, which is payable *in præsentî*, is bad, unless it be on a new consideration. The plaintiff here proceeds on an executed consideration, which constitutes an existing debt, and no such new consideration appears in the present case.

ALDERSON, B. If it were necessary to give an opinion upon the plea, I should wish to take some time to consider it ; but I concur with the rest of the Court in thinking that the declara-

tion is bad. The consideration is clearly executed, and the promise which the law implies thereon is to pay on request. In order to convert that promise into a promise to pay at a future day, there must be a new consideration. Here there is none, and on that ground the declaration is bad. If it were otherwise, the consequence would follow, that, as such a promise may be by word of mouth, the Statute of Limitations might always be evaded without a writing.

MAULE, B. I agree that an executed consideration is no consideration for any other promise than that which the law would imply ; if it were, there would be two co-existing promises on one consideration. On this ground, without adverting to the objections raised to the plea, I think that the defendant is entitled to judgment.

Judgment for the defendant.

ROSCORLA v. THOMAS.

IN THE QUEEN'S BENCH, TRINITY TERM, 1842.

[*Reported in 3 Queen's Bench Reports 234.*]

ASSUMPSIT. The declaration stated that, whereas heretofore, to wit, etc., in consideration that plaintiff, at the request of defendant, had bought of defendant a certain horse, at and for a certain price, etc., to wit, etc., defendant promised plaintiff that the said horse did not exceed five years old, and was sound, etc., and free from vice ; nevertheless defendant did not perform or regard his said promise, but thereby deceived and defrauded plaintiff in this, to wit, that the said horse, at the time of the making of the said promise, was not free from vice, but, on the contrary thereof, was then very vicious, restive, ungovernable, and ferocious ; whereby, etc.

Pleas : 1. *Non assumpsit*. Issue thereon.

2. That the horse, at the time of the supposed promise, was free from vice, and was not vicious, restive, ungovernable or ferocious, in manner, etc.; conclusion to the country. Issue thereon.¹

On the trial, before Wightman, J., at the Cornwall spring assizes, 1841, a verdict was found for the plaintiff on both the above issues. In Easter Term, 1841, Bompas obtained a rule

¹ There were other counts, on which issues were joined and found for the defendant.

nisi for arresting the judgment on the first count.¹ In last term,²

Erle and *Butt* showed cause.

Bompas and *Slade*, *contra*.

LORD DENMAN, C.J., in this term (May 30th) delivered the judgment of the Court.

This was an action of *assumpsit* for breach of warranty of the soundness of a horse. The first count of the declaration, upon which alone the question arises, stated that, in consideration that the plaintiff, at the request of the defendant, had bought of the defendant a horse for the sum of £30, the defendant promised that it was sound and free from vice. And it was objected, in arrest of judgment, that the precedent executed consideration was insufficient to support the subsequent promise. And we are of opinion that the objection must prevail.

It may be taken as a general rule, subject to exceptions not applicable to this case, that the promise must be co-extensive with the consideration. In the present case, the only promise that would result from the consideration, as stated, and be co-extensive with it, would be to deliver the horse upon request. The precedent sale, without a warranty, though at the request of the defendant, imposes no other duty or obligation upon him. It is clear, therefore, that the consideration stated would not raise an *implied* promise by the defendant that the horse was sound or free from vice.

But the promise in the present case must be taken to be, as in fact it was, *express*; and the question is, whether that fact will warrant the extension of the promise beyond that which would be implied by law; and whether the consideration, though insufficient to raise an *implied* promise, will nevertheless support an *express* one. And we think that it will not.

The cases in which it has been held that, under certain circumstances, a consideration insufficient to raise an implied promise will nevertheless support an express one, will be found collected and reviewed in the note³ to *Wennall v. Adney*,⁴ and in the case of *Eastwood v. Kenyon*.⁵ They are cases of voidable contracts subsequently ratified, of debts barred by operation of law, subsequently revived, and of equitable and moral obligations, which, but for some rule of law, would of themselves have been sufficient to raise an implied promise. All these

¹ The rule was also for entering a verdict, on the evidence, for the defendant; but on this the Court did not decide.

² April 28th, 1842. Before Lord Denman, C.J., Patteson, Williams, and Wightman, JJ.

³ 3 Bos. & Pul. 249.

⁴ *Ibid.*

⁵ 11 A. & E. 438.

cases are distinguishable from, and indeed inapplicable to, the present, which appears to us to fall within the general rule, that a consideration past and executed will support no other promise than such as would be implied by law.

The rule for arresting the judgment upon the first count must therefore be made absolute.

Rule absolute.

VICTORS v. DAVIES.

IN THE EXCHEQUER, APRIL 22, 1844.

[*Reported in 12 Meeson & Welsby 758.*]

ASSUMPSIT. The declaration stated that the defendant, on March 6th, 1844, was indebted to the plaintiff in the sum of £10, for money lent by the plaintiff to the defendant.

Special demurrer, assigning the following causes : That it is not alleged in the declaration that the money was lent to the defendant at his request, and that therefore there is no consideration to support the promise ; nor does it sufficiently appear that the defendant was indebted to the plaintiff.

Pearson in support of the demurrer. The declaration is insufficient for want of the averment that the money was lent to the defendant "at his request." [Alderson, B. How can there be a lender unless there be also a borrower?] A plaintiff is bound to allege a request wherever the consideration is executed. In the notes to *Osborne v. Rogers*, 1 Saund. 264, note 1, it is said that "a past consideration is not sufficient to support a subsequent promise, unless there was a request of the party, either express or implied, at the time of performing the consideration." And in a note by the learned editors of the fifth edition, it is added, "So even an affidavit (to hold to bail) of debt for money lent and for goods sold and delivered, and for work and labor, has been held irregular, because it omitted to state that it was 'at the instance and request of the defendant,' although it stated that it was 'to and for his use and on his account ;' " for which they cite *Durnford v. Messiter*, 5 M. & Selw. 446. In *Chitty on Pleading*, Vol. I., p. 353 (7th ed.), it is also said, "In each of these counts upon an executed consideration, except that for money had and received, and the account stated, it is necessary to allege that the consideration of the debt was performed at the defendant's request, though such request might, in some cases, be implied in evidence."

[Parke, B. There is a very learned note of my Brother Manning on this subject, 1 Man. & Gr. 265, in which he goes into the whole law with respect to alleging a request, and points out the error into which Williams appears to have fallen in his comment upon *Osborne v. Rogers*. The note is thus : " The consideration being executory, the statement of the request in the declaration, though mentioned in the undertaking, appears to have been unnecessary. In *Osborne v. Rogers* the consideration of a promise is laid to be, that the said Robert, at the special instance and request of the said William, would serve the said William, and bestow his care and labor in and about the business of the said William ; and the declaration alleges, that Robert, confiding in the said promise of William, afterward went into the service of William, and bestowed his care and labor in and about, etc. Here the consideration is clearly executory, yet Williams, in a note to the words ' at the special instance and request,' says, ' these words are necessary to be laid in the declaration, in order to support the action. It is held that a consideration executed and past—as, in the present case, the service performed by the plaintiff for the testator in his lifetime for several years then past—is not sufficient to maintain an *assumpsit*, unless it was moved by a precedent request and so laid.' The statement, according to modern practice, of the accrual of a debt for, or the making of a promise for the payment of, the price of goods sold and delivered, or for the repayment of money lent, as being in consideration of goods sold and delivered, or money lent to the defendant, *at his request*, is conceived to be an inartificial mode of declaring. Even where the consideration is entirely past, it appears to be unnecessary to allege a request, if the act stated as the consideration cannot, from its nature, have been a gratuitous kindness, but imports a consideration *per se*. It being immaterial to the right of action whether the bargain, if actually concluded and executed, or the loan, if made, and the moneys actually advanced, was proposed and urged by the buyer or by the seller, by the borrower or by the lender. *Vide Rastall's Entries*, tit. ' Dette ; ' and *Co. Ent.*, tit. ' Debt. ' " There cannot be a claim for money lent unless there be a loan, and a loan imports an obligation to pay. If the money is accepted, it is immaterial whether or not it was asked for. The same doctrine will not apply to money paid, because no man can be a debtor for money paid unless it was paid at his request. What my Brother Manning says, in the note to which I have referred, is perfectly correct.]

POLLOCK, C.B. There cannot be a doubt about this case ; the statement that the money was lent implies that it was ad-

vanced at the request of the defendant. There must be judgment for the plaintiff.

PARKE, ALDERSON, and ROLFE, BB., concurred.

Judgment for the plaintiff.

HATCH, ADMINISTRATOR, APPELLANT, v. PURCELL.

IN THE SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE,
DECEMBER TERM, 1850.

[Reported in 1 Foster 544.]

APPEAL from the decree of the judge of probate for this county, accepting the report of the commissioner of insolvency upon the estate of Sarah Gardner, the widow of William Gardner.

James W. Emery, Esq., was appointed administrator of the estate, but resigned his trust, and Albert R. Hatch, Esq., was appointed administrator *de bonis nou.* Abraham Wendell was permitted by the Court to appear and prosecute the appeal.

The declaration filed by the appellee was in *assumpsit* for money lent, money paid, services rendered, and goods sold. The specification included money paid for funeral expenses, and for the expenses of the last sickness, amounting to the sum of \$170.05, sundry miscellaneous bills, amounting to \$25.92, and a claim arising out of services performed in the family of the deceased from August 11th, 1835, to August 11th, 1841, 312 weeks at \$2 per week, \$624, the whole claim amounting to \$819.97. The sum allowed by the commissioner for her services, and the interest thereon, was \$702.83. The appeal stated that the appellant was dissatisfied with the allowance of the claim for services, and therefore claimed an appeal. The counsel for the appellee contended, that as this was the only matter stated as a reason for the appeal, it was the only claim which the appellant had a right to contest, but the appellant contended that all the claims might be disputed.

The case was referred to an auditor, from whose report the following facts appeared :

Mrs. Gardner was a sister of Susan Purcell, the appellee. As to the claim of the appellee on account of her services in the family of Mrs. Gardner, it appeared that the family of William Gardner was one of the most respectable in Portsmouth, and lived in as good style as any other, and Mrs. Gardner lived in pretty much the same style after his death ; that Mrs. Gardner

for six years and more prior to her death was of feeble health, and for a considerable portion of the time was an invalid, and unable to do any work ; that the appellee during that time had the charge and management of all the domestic affairs in the house ; she gave all the directions, attended to the work in the kitchen, took upon herself all the care and charge of the domestic affairs, and was capable and faithful in the duties required of her ; that Mrs. Gardner told her two or three years before her death, that she ought to be paid for her services ; that it would not be right for her to do so much work without compensation for it, and requested her to bring in a bill against her for her services ; and the auditor is of opinion that her services were reasonably worth \$2 per week during the time for which she claims compensation.

She testified that she went to live in the family of Mr. Gardner, upon his invitation, in 1820, soon after he was married to Mrs. Gardner, and lived there until his death, and with Mrs. Gardner until her death ; that she went to live there as a relative, and not as a hired servant under pay, and that there was no agreement or understanding between her and Mr. Gardner, that she was to be paid for her services, and she never made any claim against him or his estate therefor ; that another sister, who was blind, lived there a portion of the time as a boarder, and Mrs. Gardner for three or four years before her husband's death was in a bad state of health, and unable to attend to the domestic affairs of the family, and she, Susan, had the whole charge and management of the domestic affairs in the house in the same manner as after his death ; that after the death of Mr. Gardner, she and Mrs. Gardner and their blind sister lived together in the same house, and kept their money in the same trunk in common, and were not very particular with each other, nothing being charged for the board of their blind sister ; that she paid for her own clothing, and there was no agreement between her and Mrs. Gardner that she was to remain there as a hired servant under pay, and do the work in the family as she did, and there was no agreement or understanding between them, that she was to be paid for her services ; that Mrs. Gardner told her two or three years before her death, and at other times, that she ought to be paid for her services ; that she ought not to do so much work without suitable compensation, and requested her to bring in a bill against her for her services, and that was all the agreement or conversation that was had between them in regard to her being paid for her services. The counsel for the said Wendell objected to her claim for her services on the ground that there was no

agreement, understanding, or expectation that she was to be paid for them.

The auditor stated the following additional facts, which were proved before him, the report having been recommitted to him for that purpose. Mrs. Gardner for some time before Mr. Gardner's death was in a feeble state of health, and the appellee had the charge and management of all the domestic affairs in the house in the same manner as she did in the family of Mrs. Gardner, after Mr. Gardner's death. Nancy Purcell, the sister who was blind, paid \$3 per week for her board to Mr. Gardner until his death, but paid nothing for board after his death. The appellee went to live in the family of Mr. Gardner upon his invitation, as a relative, and made his house her home without any agreement, understanding, or expectation that she was to perform any services, or was to be paid for her services, and she never received or claimed any compensation of him or his estate therefor, and after Mr. Gardner's death she continued to reside in Mrs. Gardner's family in the same manner, and to take the same charge and management of the domestic affairs that she did before ; and she testified in her examination, that she did not live in the family of Mr. Gardner, or of Mrs. Gardner, as a hired maid under pay, or under any agreement, understanding, or expectation that she was to be paid for her services ; but after Mrs. Gardner became sick and unable to attend properly to her household affairs, the appellee took charge of them, and so continued until Mrs. Gardner's death, and Mrs. Gardner told her two or three years before her death, that she ought to be paid for her services ; that it would be unreasonable for her to do so much work as she had done in their family without being suitably compensated for it, and that Mrs. Gardner and others advised her to bring in a bill against the estate of Mr. Gardner for her services, but she declined doing it. Mr. Gardner, in his lifetime, kept a man-servant and two maid-servants in the house, and other occasional servants, and after his death Mrs. Gardner kept about the same until her death. Mrs. Gardner's family consisted of herself, Susan Purcell, Nancy Purcell, two or three nieces of Mr. Gardner, and the servants and a good deal of company, consisting of relatives and others. Mr. Gardner was a hospitable man, and entertained a good deal of company, and Mrs. Gardner kept up pretty much the same style and manner of living that he did. Mrs. Gardner was in feeble health much of the time, and required a good deal of care and attention, which was rendered by the appellee ; and Nancy, who was blind, required a good deal of waiting upon, and was not left alone ; and Susan had the principal charge of

Nancy ; but the nieces waited some upon Nancy, when Susan was attending upon Mrs. Gardner in her sickness. Mrs. Gardner was a capable woman, and though in feeble health, yet her mind remained unimpaired until her death. Mrs. Gardner had, during her life, the income of all Mr. Gardner's estate, consisting of \$10,700 in bank stock, \$10,400 real estate, and of about \$2000 in furniture, cash, and stock on the farm. Mrs. Gardner lived in the mansion-house, but it did not appear that she received much income from the other real estate. The appellee also testified that she, Mrs. Gardner, and Nancy kept boarders for a living, previous to the marriage of Mrs. Gardner ; that she, Mrs. Gardner, and Nancy had property in common, aside from that which Mrs. Gardner received from Mr. Gardner's estate ; that Mrs. Gardner put her income into the common trunk, and each one took out what she wanted, without keeping any account of what was put in or taken out by each ; that she, Susan, did not take out more than she put in ; that Mrs. Gardner, two or three weeks before her death, sold, through her agent, the shares in the State Bank in Boston, and received therefrom about \$5500 ; that she, Susan, knew where Mrs. Gardner paid out about \$3000 and over from that money, and did not know what became of the rest ; that the money was kept in a trunk in the house, and when she examined the trunk after Mrs. Gardner's death, there was no money there ; that Mrs. Gardner paid her, Susan, \$500, and Nancy \$500, from that money, which was for money borrowed of them ; that she, Susan, purchased some railroad stock with her own and Nancy's money about the time she received it, and afterward sold the stock and let the money with other money, the whole amounting to \$2000 ; that she, Susan, had other property, and was the sole heir of Nancy, who died two or three years after Mrs. Gardner ; that she, Mrs. Gardner, and Nancy owned a house in common in Portsmouth, which they sold for \$1000, and let \$800 of the money in 1834 or 1835, to John Gardner, and took a mortgage to secure the payment of the note which he gave for the money, no part of which note has been paid ; that the note was in the house of Mrs. Gardner at the time of her death, and she, Susan, received it afterward ; that Mrs. Gardner told her that she might have the note, and that everything which she left was hers, but she, Susan, never paid anything for it, and the note was not delivered to her by Mrs. Gardner, but was kept there in the house, and was payable to and owned by the three together ; that there was a note against Mr. Colby, of Wendell, N. H., payable to Mrs. Gardner, but part of which belonged to Susan, and she, Susan, after Mrs. Gardner's death,

collected the note, and received \$240 on it ; that she told Mr. Hatch, the administrator of Mrs. Gardner, what part belonged to the estate, and what to her, and paid over to Mr. Hatch the part which belonged to the estate.

Hatch, pro se (with whom was *Christie*).

Hackett for the appellee.

GILCHRIST, C.J. The case finds that the appellee did not go to Mrs. Gardner's house under any understanding or agreement that she was to be paid for her services. She went there as a relative, and not as a hired servant to receive compensation, and made no claim against Mr. Gardner or his estate for compensation. She had the whole charge of the family for some years. Mrs. Gardner told her two or three years before her death, and at other times, that she ought to be paid for her services, that she ought not to do so much work without compensation, and requested her to bring in a bill against her for her services, and this was all the agreement or conversation they had on the subject.

It is upon this state of facts that the claim now before us is to be considered.

It has been settled since the time of Hobart, that "a mere voluntary courtesy will not have consideration to uphold an *assumpsit*." *Lampleigh v. Brathwait*, Hob. 105 ; *Bartholemew v. Jackson*, 20 Johns. 28. For it is not reasonable, it has been said, that one man should do another a kindness, and then charge him with a recompense. *Osborne v. Rogers*, 1 Saund. 264, note 1. A consideration executed and past is not sufficient to maintain an *assumpsit*, unless it were moved by a precedent request, and so laid. But where a party derives benefit from the consideration, it is sufficient, because equivalent to a previous request. *Ibid.* A request may be implied from the beneficial nature of the consideration, and the circumstances of the transaction. *Hicks v. Burhans*, 10 Johns. 243. And it is the province of the jury to determine from the evidence whether a promise can be inferred or not. *Oatfield v. Waring*, 14 Johns. 188. Where one pays a sum of money for another, without any request, and the other afterward agrees to the payment, this is equivalent to a previous request to do so. The benefit to the party, connected with his express promise to pay, must be deemed equivalent to a previous request. *Doty v. Wilson*, 14 Johns. 378 ; *Livingston v. Rogers*, 1 Caines, 584-585.

In the present case beneficial services were performed by the appellee for Mrs. Gardner, and she recognized them as such, and requested the appellee to bring in a bill for them. There is then evidence from which both a previous request and a

promise may be implied, and we think the decision of the judge of probate was correct.

The point that the claim for services being the only matter stated as a reason for the appeal, is the only one which the appellant has a right to contest, has been settled for the appellee in the case of *Mathes v. Bennett*, adm'x, *supra*, p. 188.

Decree affirmed.

BRADFORD v. ROULSTON.

IN THE EXCHEQUER OF IRELAND, JUNE 12, 1858.

[*Reported in 8 Irish Common Law Reports 468.*]

THIS was an action for breach of a contract, by the defendant, to pay a sum of £55, the balance of the purchase-money of a vessel sold by the plaintiff to a third person.

The summons and plaint contained four special counts, and a count upon an account stated. No question arose upon the first, third, and fifth counts ; but the second and fourth, which were framed upon a guarantee, were as follows : Second count. That in consideration that the plaintiff, at the express instance and request of the defendant, would execute to one James Gribben and John M'Teague a bill of sale of a certain vessel of the plaintiff, the defendant contracted and agreed with the plaintiff to guarantee the payment to the plaintiff, on the day following the making of such contract, of the sum of £55, being the balance of the purchase-money payable by the said John M'Teague, in respect of such bill of sale ; and the plaintiff avers that, relying on the said contract and agreement by the defendant, he did execute such bill of sale, and did perform all things on the part of him, the said plaintiff, in relation to the said contract to be performed ; but the plaintiff avers that neither of them, the said James Gribben or John M'Teague, or the defendant, did pay the said sum of £55, or any part thereof, on the day aforesaid or since, and the same still remains wholly unpaid ; of all which said defendant had notice.

Fourth count. That it had been agreed between the plaintiff and one James Gribben and John M'Teague, that the plaintiff should execute to them a bill of sale of a certain other vessel of the plaintiff, for the price or sum of £230 ; and the plaintiff avers that, at the time of executing such last-mentioned agreement, the said John M'Teague omitted to pay over, to or for the plaintiff, the sum of £55, being the balance of the purchase-

money payable by the said John M'Teague, in respect of such last-mentioned agreement ; and the plaintiff avers that he, the said plaintiff, was thereupon unwilling to execute such bill of sale ; and the plaintiff says that defendant then expressly requested the plaintiff to execute the said bill, and that, in consequence of such request, the plaintiff did actually execute the same ; and the plaintiff avers that the defendant did, afterward, in consideration of the plaintiff having so executed said bill of sale, at the instance and request of the defendant, guarantee to the plaintiff the payment to him, by the said John M'Teague, of the sum of £55, on the day following the execution of such bill ; but the plaintiff says that neither the said John M'Teague nor the defendant did pay the said sum of £55, or any part thereof, on the day agreed on or since, but same still remains wholly unpaid ; of all which the defendant had notice.

The defendant, by his defences, traversed the making of the contract stated in the summons and plaint ; and the issues settled upon the pleadings were, in substance, whether the defendant contracted as alleged ?

At the trial, before Ball, J., at the spring assizes of 1858, for the county of Antrim, a letter of the defendant, which it appeared was written subsequently to the transaction stated in the pleadings, was relied upon by the plaintiff as a guarantee for the payment of the £55. The jury, upon a question submitted to them, found that this letter was a guarantee ; and his Lordship thereupon directed a verdict for the plaintiff on the second and fourth counts, reserving liberty to the defendant to move to have a verdict entered for him upon the second count. Upon the other counts the jury found a verdict for the defendant.

R. Andrews having, on the part of the defendant, obtained a conditional order to have a verdict entered for him on the second and fourth counts, or that judgment upon the fourth count should be arrested, the

Solicitor-General and *F. R. Falkiner* now showed cause.

R. Andrews and *M. Harrison*, *contra*.

A full statement of the material facts of the case, the arguments of counsel and the cases cited, will be found in the judgment of the Lord Chief Baron.

Cur. ad. vult.

PIGOT, C.B. By the conditional order in this case, the defendant seeks to have a verdict entered for him as to the second and fourth counts of the plaint, or (as to the fourth count) that judgment be arrested. It appears from the report of the learned judge, that the reservation made by him, and the objection to the evidence on which it was founded, applied to the second

count only. The questions before us, therefore, are, whether the verdict shall be entered for the defendant on the issue as to the second count, and whether judgment shall be arrested as to the fourth? The plaintiff desiring to retain his verdict on both counts, it becomes necessary to determine both questions. The second count is as follows. [His Lordship read the second count and proceeded.] It is unnecessary to state the evidence in detail, in result it established the following facts :

The defendant was a ship-broker, and had been employed by the plaintiff to sell a vessel called the *Argo*. The vessel was sold by the defendant to James Gribben and John M'Teague, for £230. The plaintiff and the two purchasers met the defendant at his office. The bill of sale had been then prepared, and the register of the vessel was ready to be delivered. Gribben produced £115, M'Teague produced £60 only, and the balance of £55 not being forthcoming, the plaintiff, at the request of the defendant, and on the defendant's promise to remit to the plaintiff the balance of £55 on the following day, executed the bill of sale, and delivered it and the register to the purchasers. In about half an hour after all this took place the plaintiff, who had left the defendant's office, returned and said "he would feel obliged to him" (the defendant) "to commit his promise to writing." The defendant then, at once, wrote the following document, and gave it to the plaintiff, asking him "if that would please him?" The plaintiff said it would, and took the document. It was in these terms :

"L. DERRY, December 15th, 1858.

"JAMES BRADFORD, Esq.:

"DEAR SIR : You are paid short, by Captain Montague, £55, on sale of *Argo*, which I will remit to you to-morrow, by post. I am, dear sir, your obedient servant,

"A. ROULSTON."

The possession of the vessel was not delivered to the purchasers until the following day. The balance of £55 was never paid. The jury found, in effect, that the letter was a guarantee to pay in default of M'Teague. On this finding the learned judge directed a verdict for the plaintiff, on the second count, reserving leave to the defendant "to move, in regard to the second count, that the contract entered into at the time the bill of sale was signed, not having been then in writing, a verdict be entered on the second count for the defendant."

The question upon the import of the contract was, I presume, left to the jury, by the consent of the parties, inasmuch as the

consideration of the defendant's undertaking (which, of course, formed part of the contract) was not expressed in the writing. The 3d section of the 19 & 20 Vic., c. 97, allows the consideration of a contract to answer for the debt of another to be proved by parol, and upon the finding of the jury, and upon the reservation made of the point saved by the learned judge, it must be taken that the consideration was proved, as laid. The question which we have to determine is, whether the written evidence of the undertaking, coupled with the parol evidence of the consideration, proved by legal evidence, within the Statute of Frauds, the contract, as stated in the second count? At the time the bill of sale was executed, there was no contract capable of being proved, under the Statute of Frauds; but when the action was brought there existed, and there was proved at the trial, a note or memorandum in writing signed by the proper party.

It was, however, argued that the writing having been given after the act was performed (namely, the execution of the bill of sale), which was the consideration of the executory contract, and after the making of the executory contract itself, the proof of the writing not only does not support the statement that such a contract as is set forth in the second count had legal existence, but disproves it.

It is unnecessary to decide here how this argument should be dealt with, if this were a contract under the 13th section of the Irish Statute of Frauds, 7 W. 3, c. 12 (corresponding with the 17th section of the English statute, 23 Car. 2, c. 3). This is a contract under the 2d section of the Irish, analogous to the 4th section of the English Statute of Frauds, which does not annul the parol contract, but only enacts that "no action shall be brought whereby to charge the defendant, upon any special promise to answer for the debt, default, or miscarriage of another person," unless the "agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." It has been repeatedly held, in reference to contracts within the 4th section of the English statute, that they were provable by writings subsequently signed, and recognizing an agreement previously made. In *Longfellow v. Williams*¹ the written evidence of the contract offered at the trial was a letter written to a third person by the defendant, after the forbearance was given, which was the consideration for the alleged promise. Lawrence, J., in admitting the evidence, said: "The Statute

¹ 2 Peake, N. P. C., 225.

of Frauds requires some note or memorandum in writing ; such note exists in the present case ; the agreement is fully proved by it ; and therefore the promise, though originally by parol, is not within the statute." In *Shippey v. Derrison*,¹ Lord Ellenborough pronounced a similar rule ; and in each of the cases of *Dobell v. Hutchinson*,² *Owen v. Thomas*,³ and *Hemming v. Perry*,⁴ the writing was subsequent to the parol contract. That a letter to a third person has been held good evidence of the contract described in it, is stated by Lord St. Leonards (*Ven. and Pur.*, p. 113), citing *Welford v. Beazely*⁵ and *Smith v. Watson*.⁶ The 4th section of the statute was recently the subject of full consideration in the case of *Leroux v. Brown*.⁷ There, a verbal contract, made in France, was proved by parol. By the law of France such a contract was binding in that country ; and if the 4th section of the Statute of Frauds had made such a contract void, and had thus made the writing one of the "solemnities" or "ceremonies" of the contract, the law of England, by the comity of nations, would have yielded to the law of France, and the contract would, in the opinion of the Court, have been provable according to the *lex loci*. But the Court held that, by the 4th section of the Statute of Frauds (differing in this respect from the 17th section), the contract was not to be treated as void, if made in England, because it was not evidenced by writing, but was merely rendered incapable of proof before an English tribunal ; that the 4th section regulated the procedure, and that consequently the proof of it must be regulated by the *lex fori* and not the *lex loci*—by the law of England, where the action was tried, and not by the law of France, where the contract was made. Jervis, C.J., in giving judgment, said : " This, therefore, may be a very good agreement, though, for want of compliance with the requisites of the statute, not enforceable in an English court of justice."

It was further urged in this case that the executory contract was executed by the party suing, and consequently the alleged stipulated benefit was gained by the defendant, or the stipulated prejudice was incurred by the plaintiff before the writing was signed ; but in several of the cases which I have cited this very circumstance occurred, and it must occur, in many instances, or the controversy could not arise. The result of the authorities is that if the contract be vouched by a note or memorandum in writing, signed by the proper party (at all events, if

¹ 5 Esp. 190.² 3 Ad. & Ell. 355.³ 5 Myl. & K. 353.⁴ 2 M. & P. 375.⁵ 3 Atk. 503.⁶ Bunb. 55.⁷ 12 C. B. 801.

so signed before the action is brought), that will be sufficient proof under the 4th section of the English (the 2d section of the Irish) Statute of Frauds. I abstain from giving any opinion as to the effect of such evidence, under similar circumstances, of a contract under the 17th section. At the same time I may observe that, in several cases of sales of goods, under the 17th section, as in *Saunderson v. Jackson*,¹ *Jackson v. Lowe*,² and particularly in *Schneider v. Norris*,³ in which the point seems very clearly presented, the documents constituting the written evidence received of such sales were signed subsequently to the contract.

Since the foregoing part of this judgment was prepared, I have met with a recent case in the Court of Chancery in England, *Barkworth v. Young*,⁴ in which the very point in controversy upon this part of the conditional order was decided by Vice-Chancellor Kindersley, holding, that where there was a verbal contract made in consideration of marriage, and a statement of the contract was, after the marriage, made in an affidavit signed by the contracting party, the statement in the affidavit was sufficient evidence of the contract, under the 4th section of the Statute of Frauds. It is singular that, in his able and elaborate judgment, in which he reviews the cases in courts of equity, he does not advert to any of the cases decided at law.

The defendant, by the conditional order, also seeks to arrest the judgment on the fourth count. The plaintiff obtained a verdict upon the issues joined on that count; and as to this, no point was saved, and no objection was made at the trial. The fourth count states an agreement, by which the plaintiff agreed to execute a bill of sale of a vessel to Gribben and M'Teague for £230. That at the time of executing that agreement M'Teague omitted to pay the plaintiff £55, being the balance of the purchase-money payable on that agreement; that the plaintiff being unwilling to execute the bill of sale, the defendant expressly requested him to do so, and that, in consequence of that request, the plaintiff executed the bill of sale; and the count then states that "the defendant did afterward, in consideration of the plaintiff having so executed said bill of sale, at the instance and request of the defendant, guarantee to the plaintiff the payment to him, by the said John M'Teague, of the sum of £55 on the day following the execution of such bill of sale." The question is whether this count is bad; the contract alleged being upon an executed consideration, and not

¹ 2 Bos. & P. 238.

² 1 Bing. 9.

³ 2 M. & S. 286.

⁴ 26 Law Jour., N. S., Ch. 153; since reported, 4 Drew. 1.

being a contract which, from such consideration, the law would imply.

It is clearly established that where a past consideration—that is, a thing previously done by the plaintiff at the request of the defendant—is one from which the law implies a promise, an express promise different from, or in addition to, that which the law implies, is *nudum pactum*, on the ground that the whole consideration is exhausted by the promise which the law implies. Among those authorities are *Brown v. Crump*,¹ *Granger v. Collins*,² *Hopkins v. Logan*,³ *Roscorla v. Thomas*.⁴ And this principle of law was recognized and approved in *Kaye v. Dutton*,⁵ by Tindal, C.J., and also in all the stages of *Elderton v. Emmens*.⁶ This is in exact conformity with the opinion of Rolle, expressed at the end of his report of *Hodge v. Vavisor*,⁷ and it is involved in the decision of *Docket v. Voyel*.⁸ But it has also been held, in a long series of decided cases, that where there is a past consideration, consisting of a previous act done at the request of the defendant, it will support a subsequent promise; the promise being treated as coupled with the previous request. The leading authority for this proposition is *Lampleigh v. Brathwait*.⁹ But it has been so laid down in a great number of ancient authorities. In *Hunt v. Bate*,¹⁰ called in several of the books *Hunt v. Baker*, the defendant's servant was arrested and imprisoned in the Compter in London for trespass. The plaintiff and another, in order that the defendant's business "should not go undone," bailed the servant. The defendant afterward promised the plaintiff to save him harmless from all damages and costs that might be adjudged against him in consequence of becoming the servant's bail. The plaintiff brought an action upon this promise for the amount of damages he was compelled to pay as the servant's bail; and after verdict for the plaintiff, the judgment was arrested "because" (the report states) "there is no consideration whereof the defendant should be charged for the debt of his servant, unless the master had first promised to discharge the plaintiff, before enlargement and mainprise made of his servant; for the master did never make request to the plaintiff for his servant to do so much, but he did it of his own head. But," the reporter adds, "in another like action on the case, brought upon a

¹ 1 Marsh. 567.

² 6 M. & W. 458.

³ 5 M. & W. 241.

⁴ 3 Q. B. 234.

⁵ 7 Man. & G. 807; S. C., 8 Scott, N. R., 495.

⁶ 4 C. B. 479; S. C., 6 C. B., 160; S. C., 4 H. L. Cas. 624.

⁷ 1 Rol. Rep. 413.

⁸ Cro. Eliz. 885.

⁹ Hob. 105; S. C., 1 Sm. L. C. 118.

¹⁰ 3 Dyer, 272b.

promise to pay £20, made to the plaintiff by the defendant, in consideration that the plaintiff, at the special instance of the defendant, had taken to wife the cousin of the defendant, that was a good cause, although the marriage was executed and past before the undertaking and promise, because the marriage ensued the request of the defendant." Several cases are referred to in the notes (ascribed to Treby, C.J.), which are appended in 3 Dyer, p. 272, to the report of the case of *Hunt v. Bate*. In two of these, *Halifax v. Barker*¹ and *Sandhill v. Jenny* (not reported elsewhere), it is stated that a promise, founded upon a previous matter done by the plaintiff at the defendant's request was held insufficient; but such a promise was held binding in each of four other cases, one of which was decided by all the judges. These were *Rigge v. Bullingham*,² *Baxter v. Read* (not reported elsewhere), *Gale v. Golsbury* (the history of which is given in the note, 3 Dyer, 272*b*), and *Sidnam v. Worthington*.³ *Sidnam v. Worthington* was, in substance, the same as *Hunt v. Bate*, with only the difference that the plaintiff became bail at the request of the defendant. In *Gale v. Golsbury*, the defendant requested the plaintiff to deliver £600 worth of wine to J. S.; and the defendant, in consideration that the plaintiff, at defendant's request, had delivered the wine to J. S., promised to pay him if J. S. did not. The action was brought for £200 remaining unpaid: "And adjudged by all the judges of England that an action lies by Gale against Golsbury." If the law was truly declared in these decisions, they are direct authorities for the plaintiff, in support of the fourth count of this plaint.

The report of the case of *Hunt v. Bate*, in Dyer, is referred to and recognized in a variety of subsequent cases, as laying down a principle of law with reference to past considerations, by which those decisions were influenced. It was so referred to in *Sidnam v. Worthington*,⁴ in *Marsh & Rainsford's Case*,⁵ in *Dogget v. Dowell*,⁶ in *Bosden v. Thinne*,⁷ in *Jones v. Clarke*,⁸ in *Townsend v. Hunt*,⁹ in the leading case of *Lampleigh v. Brathwait*,¹⁰ and in *Oliverson v. Wood*.¹¹ The principle was applied in many of the old authorities collected in 1 Rolle's Abr., p. 11, Action sur le case, Q., and in the corresponding title, 1 Vin. Abr., p. 29, where the abstracts of the cases in Rolle's

¹ Cro. Eliz. 741.

² *Ibid.* 715.

³ *Ibid.* 42; S. C., Godb., 33; S. C., 2 Leon. 224.

⁴ Godb. 33, 27 Eliz.

⁵ 2 Leon. 111, 30 Eliz.

⁶ Owen, 144, 43 & 44 Eliz.

⁷ Yel. 40, 1 Jac. 1.

⁸ 2 Bul. 73, 11 Jac. 1.

⁹ Cro. Car. 408, 11 Car. 1.

¹⁰ 1 Hob. 105; S. C., 1 Sm. L. C. 119, 13 Jac. 1.

¹¹ 3 Lev. 366.

Abr. are translated, and several others are added : *placita*, 2, 3, 4, 5, 6, 7, 8, 18, 19, 38, 40, 43, 49. Also in Com. Dig., Action on the Case upon Assumpsit (B 12), where the cases are distinguished from those in which the action does not lie collected at (F 6). Coming down to later times, we find in *Hayes v. Warren*¹ a decision which has been repeatedly treated as the ruling modern authority for the proposition that *assumpsit* will not lie upon a promise for a past consideration unless it be at the request of the defendant. In the report of that case in 2 Barnard, p. 141, the Lord Chief Justice (Raymond), in giving judgment, referred to the case in Cro. Eliz. p. 741 (*Halifax v. Barker*, one of the cases cited in the note to 3 Dyer, p. 272). There the action was *assumpsit*, "Whereas in consideration that the plaintiff, by the defendant's appointment, and for his debt, shortly before paid to R. S. £60, the defendant assumed to pay it upon request." And it is reported in Cro. Eliz. p. 741, that the Court held the consideration was past, and not sufficient. The Lord Chief Justice, according to the report of *Hayes v. Warren*,² states : "They," the Court, "did agree likewise, that where there was an express request at the time of the past consideration being performed that might, in all cases, be sufficient to support a subsequent promise ; and, therefore, the Chief Justice said he could not agree the case cited out of 3 Cro. p. 741, to be law." And, unquestionably, that case is directly opposed (if it was not so decided upon the term "appointment," as not indicating request) to the express decisions in the same book, Cro. Eliz. pp. 42, 59, 807. It is clear that the Court, in *Hayes v. Warren*, affirmed the principle of law laid down in *Hunt v. Bate* and *Lampleigh v. Brathwait*. And Wilmot, J., who, in *Pillans v. Van Mierop*,³ quarrels with the decision in *Hayes v. Warren*, as too much restricting contracts, treats it as "now settled, that where the act is done *at the request* of the person promising, it will be a sufficient foundation to graft a promise upon."

This rule of law was the foundation of express decision in *Wilkinson v. Oliveira*.⁴ It was recognized in Lord Denman's judgment in *Eastwood v. Kenyon*,⁵ in that of Tindal, C.J., in *Kaye v. Dutton*,⁶ and in that of Littledale, J., in *Payne v. Wilson*.⁷ But in *Roscorla v. Thomas*⁸ Lord Denman intimated an

¹ 2 Str. 933 ; S. C., Ke. 117 ; S. C.,

2 Bar. 140, 5 G. 2.

² 2 Barnard, 141.

³ 3 Burr. 1671.

⁴ 1 Bing. N. C., 490 ; S. C., 1 Scott, 461.

⁵ 11 Ad. & Ell. 452.

⁶ 7 Man. & G. 815, 816 ; S. C., 8 Scott, 502.

⁷ 7 B. & C. 427.

⁸ 3 Q. B. 234.

opinion which, in one construction of the language, would seem to lay down, as a general rule of law, that a past or executed consideration will support no promise save one which the law would imply from it; that proposition importing, not merely that where a promise would be implied by law, and would therefore exhaust the consideration, no other express promise will be sustained by the same past consideration, but further, that no promise at all will be sustained by such consideration, unless a promise would be implied from it by law, and then only such promise as would be so implied.

The proposition, in that extended sense, has never been the subject of express decision. It did not arise in *Brown v. Crump*,¹ in *Hopkins v. Logan*,² in *Granger v. Collins*,³ in *Eastwood v. Kenyon*,⁴ in *Beaumont v. Reeve*,⁵ in *Jackson v. Cobbin*,⁶ in *Lattimore v. Garrard*,⁷ in *Elderton v. Emmens*,⁸ in any of its stages, nor even in *Roscorla v. Thomas*. In each of these cases (except *Beaumont v. Reeve*), the law implied, from the consideration, a promise which exhausted it. In *Elderton v. Emmens* the Court of Common Pleas held that the express promise went beyond the implied one, and therefore could not be sustained. The Court of Exchequer Chamber and the House of Lords held that the express promise was only equivalent to the implied one, and they therefore sustained it. In *Beaumont v. Reeve* the declaration stated, in effect, that the defendant had seduced the plaintiff, and thereby rendered her incapable of procuring an honest livelihood; that they had parted and agreed to live separate, and to have no further immoral intercourse together; and that as a compensation for the injury which the defendant had done to the plaintiff, and in consideration of the premises, he undertook and promised to pay her a yearly sum of £60. There was in that case plainly no consideration for the promise, but the moral obligation to repair a wrong. No precedent request or solicitation, either express or involved in the fact of seduction, could have created any sufficient consideration; for the immoral intercourse, with or without an express request, could not have formed any legal consideration, either executory or executed for a valid promise. It was therefore within the direct authority of *Eastwood v. Kenyon*,⁹ in which, on a review of the authorities, it was determined that a mere moral obligation will not support an *assumpsit*; and this appears to be the

¹ 1 March. 567.² 5 M. & W. 241.³ 6 M. & W. 458.⁴ 11 Ad. & Ell. 438.⁵ 8 Q. B. 483.⁶ 8 M. & W. 790.⁷ 1 Exch. 809.⁸ 4 C. B. 479; S. C., 6 C. B. 160;⁴ H. L. Cas. 624.⁹ 11 Ad. & Ell. 438.

ground of the judgments in *Beaumont v. Reeve*, of Patteson and Coleridge, JJ. Lord Denman, in *Beaumont v. Reeve*, expounds his own meaning of the proposition which he stated in *Roscorla v. Thomas* thus: "The result is, that an express promise cannot be supported by a consideration from which the law could not imply a promise, except where the express promise does away with a legal suspension or bar of a right of action which, but for such suspension or bar, would be valid;" a proposition which, by the generality of its terms, would exclude the case of a promise of a defendant, founded on a previous benefit rendered to the defendant at his request. I am not sure whether Parke, B., in *Elderton v. Emmens*¹ or in *Garrard v. Latimore*,² and Maule, J., in *Emmens v. Elderton*³ adopted the proposition in that extended sense, or meant to confine it, as it appears to have been confined by Lord Truro, in 4 Com. B., p. 494, and 4 H. of L. Cas., p. 672; by Maule, J., in 4 Com. B., p. 496; by Cresswell, J., in 4 Com. B., p. 496; and Crompton, J., in 4 H. of L. Cas., p. 439; and as Tindal, C.J., appears to have done in *Kaye v. Dutton*,⁴ to cases where the consideration is one from which the law *does* imply a promise, which therefore exhausts the consideration. The reporter certainly understood the language used in 4 Com. B., p. 496, to be so confined, as appears from his note at that page of his report; and it is perfectly plain that the decision or the judgment in which it was pronounced, in *Eastwood v. Kenyon*, or the note to *Wennall v. Adney*,⁵ to both of which Lord Denman refers in his judgment in *Roscorla v. Thomas*, give no sanction to a denial of the rule of law laid down in *Hunt v. Bate* and *Lampleigh v. Brathwait*. Lord Denman, in *Eastwood v. Kenyon*, not only refers to that rule, and to both those cases as establishing it, but refers also to *Townsend v. Hunt*,⁶ as recognizing and acting on the distinction which those cases establish and explain, between a past consideration with, and a past consideration without, a precedent promise; and he precedes those references by the following passage: "In holding this declaration bad, because it states no consideration but a past benefit, not conferred at the request of the defendant, we conceive that we are justified by the old common law of England." In the note to *Wennall v. Adney*, the case of *Lampleigh v. Brathwait*, and the distinction there explained, is explicitly stated, without any denial of its authority.

I have thought it necessary to enter into this detailed discussion, because the language of the judges, in some of the cases

¹ 6 C. B. 174.

³ 4 H. L. Cas. 658.

⁵ 3 Bos. & P. 249.

² 1 Exch. 809.

⁴ 7 Man. & G. 815-816.

⁶ Cro. Car. 408.

I have cited, is so general that it would seem to sustain the objection to the fourth count of the plaint before us. It is very much to be lamented that the language so used (as reported) was not accompanied with such explanation as would have clearly shown whether the learned judges intended to declare that in their opinion the rule laid down in *Hunt v. Bate*, *Lamp-leigh v. Brathwait*, and *Wilkinson v. Oliveira*, and in the multitude of other decided cases which I have mentioned, or the exposition of that rule in *Kaye v. Dutton*, was or was not law. In no one of the cases, in which the language to which I have referred was used by them, was any one of those authorities named; in no one was it stated that the rule which those authorities expounded and applied was to be no longer treated as a rule of law. I own it appears to me that a rule so well and so long established, if inexpedient, ought to be abrogated, if it all, by an act of the Legislature, or, if otherwise reversed, ought to be reversed only by the highest appellate tribunal; especially when the change would have the effect of narrowing the sphere within which mankind shall be permitted to bind each other by their deliberate dealings.

Notwithstanding, then, the expressions of opinion of the learned judges which I have referred to, unnecessary for determining the questions judicially before them (even if they conveyed the more extended meaning on which I have commented), I cannot, in deference to those expressions of opinion, pronounce a judgment reversing a series of decisions made by successive judges, and establishing a rule of law that has been understood to prevail for, certainly, more than two centuries.

We refuse to arrest the judgment on the fourth count, or enter a verdict on the second; and our order will therefore be, to allow the cause shown against the whole of this conditional order.

(h) *Moral obligation as a consideration.*

WATSON *v.* TURNER *ET AL.*

IN THE EXCHEQUER, TRINITY TERM, 1767.

[*Reported in Buller's Nisi Prius* 129.]

AN action was brought by an apothecary against the overseers of a parish for the cure of a pauper, who boarded with her son out of the parish, under an agreement made with him by the defendant Turner, who was the only acting overseer of the parish. The pauper was suddenly taken ill, and her son

called in the plaintiff, who had attended her for four months, and cured her. After the cure Turner was applied to, and promised to pay the plaintiff's bill. It was held that though there was no precedent request from the overseers, yet the promise was good notwithstanding the Statute of Frauds, for overseers are under a moral obligation to provide for the poor. Secondly, that as Turner was the only acting overseer, the other was bound by his promise. *Watson v. Turner et al.*, in Scacc. T. 7 Geo. III.

ATKINS AND WIFE *v.* HILL.

IN THE KING'S BENCH, EASTER TERM, 1775.

[*Reported in Cowper 284.*]

IN *assumpsit* the plaintiffs declared against Charles Hill, being in the custody, etc., for that, whereas James Clarke, etc., by his last will, etc., did give and bequeath to the plaintiff's wife the sum of £60, etc., and of his last will and testament made the said Charles Hill sole executor, etc., and the said Charles Hill took upon himself the burden and execution of the said will. And the said N. and A. further say that divers goods and chattels, etc., afterward, etc., came to the hands of the said Charles Hill as executor of the said James Clarke, which said goods and chattels were more than sufficient to satisfy and pay all the just debts and legacies of the said James Clarke, etc., of which the said Charles Hill then and there had notice. By reason of which said premises the said Charles Hill became liable to pay to the said N. and A. the said sum of £60, and being so liable, he, the said C., in consideration thereof, afterward, etc., undertook and faithfully promised to pay to them the said sum of £60 whenever, etc.

To this declaration the defendant demurred generally.

Le Blanc in support of the demurrer.

Buller, contra, for the plaintiff.

LORD MANSFIELD. The argument in support of this demurrer has proceeded upon supposing a *general* question, which is not at all involved in this case; and agitating that general question, as if this were a declaration upon the ground of the will only and nothing else. If it were a general question, I should not immediately give my opinion. The objection, however, that is taken upon the supposition of its being so, is that a

legacy, arising out of a will of personal estate, being a testamentary matter, the cognizance of it belongs peculiarly and *exclusively* to the ecclesiastical court ; and consequently that the courts of common law have no jurisdiction. If that proposition were true, the objection would hold equally against the jurisdiction of the courts of equity. For it is plain that where the cognizance of any matter is the peculiar province of a particular *forum* all other courts are excluded. For instance, a court of equity can no more try the validity of a will of personal estate or the validity of a marriage than this Court. The judge of the admiralty has cognizance of the question of prize. A court of equity is as much excluded as a court of law ; and many other instances might be put.

It is objected that this Court cannot compel a legatee to refund if debts should appear. In that case he would be liable to refund whether he gave security or not, for it would be the case of payment upon a mistaken ground. But if justice required it this Court would make the plaintiff's giving an indemnity a condition of his recovering. There are many cases where this Court has made parties give indemnity.

It is true that the law concerning legacies was made in the ecclesiastical court. The authority of the Roman law was received. The opinions of doctors and foreign authors upon the civil law were quoted and respected.

When the courts of equity held plea of legacies as *incident to discovery and account*, they adopted the whole system by which legacies were governed in the ecclesiastical court. In like manner the courts of law, in the exercise of a concurrent jurisdiction, would adopt the same rules.

But a legatee who sues at law must clearly prove that the defendant has received assets, which cannot be done except in a case so clear as not to admit of litigation. In this respect the *discovery and account* given in a court of equity is so preferable a remedy that it has drawn all such suitors thither ; and therefore, in fact, there is scarce an instance of a legatee attempting to sue at law. In clear cases the legacies are paid, in doubtful the relief given by a court of equity is easier and better. But upon *principles*, if the question is *constitutionally appropriated* to the ecclesiastical jurisdiction, it must equally exclude the courts of equity as well as law. I have mentioned thus much by way of observation upon the objection that has been made as supposing this a case within the general question ; which, however, as I said before, it is not.

This is a case in which the declaration particularly states that assets have been received by the defendant, the executor, more

than sufficient to pay all the testator's debts and legacies. If so, it most undoubtedly must be taken upon the pleadings that there was sufficient to discharge the funeral expenses, because they are payable first ; consequently if there was less than the amount of them there could not be sufficient to discharge the debts and legacies. The declaration then goes on to state that in *consideration* of there being full *sufficient assets* as aforesaid, the defendant undertook and promised to pay the plaintiff his legacy. No doubt, then, but at any time after an executor has *assented* the property *vests*, and if it be a pecuniary legacy, an action at law will lie for the recovery of it. Formerly upon a bill being filed in Chancery against an executor, one part of the prayer of it was that he should *assent* to the bequest in his testator's will. If he had assets he was bound to assent ; and when he had assented, the legacy became a demand which in law and conscience he was liable to pay. But in the present case there is not only an *assent* to the legacy, but an *actual promise* and undertaking to pay it, and that promise founded on a good consideration in law, as appears from the cases cited by Buller, particularly the case of *Camden v. Turner*,¹ where acknowledgment by an executor, "that he had enough to pay," was held a sufficient ground to support an *assumpsit*. Here the defendant by his demurrer admits he had sufficient to pay, therefore this is not the case that *Le Blanc* has been arguing upon, but it is the case of a promise made upon a good and valuable consideration, which in all cases is a sufficient ground to support an action. It is so in cases of obligations which would otherwise only bind a man's conscience, and which, without such promise, he could not be compelled to pay. For instance, where an infant contracts debts during his minority, if after he comes of age he consents to pay them an action lies. So a conveyance executed by an infant, which he was compellable to do by equity, is a good conveyance at law. *Co. Lit. Attornment*, 315*a*. In this case the promise is grounded upon a reasonable and conscientious consideration—namely, that the defendant had assets to discharge the legacy. If so, he was compellable in a court of equity or in the ecclesiastical court to pay it. I give my opinion upon this case as it stands—that is, that it is an express promise made upon a good and sufficient consideration. *Vide* the next case.

The three other judges concurred.

Per CURIAM. Judgment for the plaintiff.

Le Blanc then moved for liberty to withdraw the demurrer and plead the general issue, but the Court refused it.

¹ *Sittings after Trinity Term.* 5 Geo. 1. C. B. *coram*, King, C.J.

TRUEMAN v. FENTON.

IN THE KING'S BENCH, JANUARY 28, 1777.

[*Reported in Cowper 544.*]

THIS was an action on a promissory note bearing date February 11th, 1775, payable to one Joseph Trueman (the plaintiff's brother) three months after date for £67 and endorsed by him to the plaintiff.

The declaration contained other counts for goods sold, money had and received, and on an account stated. The defendant pleaded, first, *non assumpsit*. Secondly, "That on January 19th, 1775, he became bankrupt, and that the debt for which the said note was given was due to the plaintiff before such time as he the defendant became bankrupt, and that the note was given to Joseph Trueman for the use of and for securing to the said plaintiff his debt so due." The cause was tried before Lord Mansfield at the sittings after Michaelmas Term, 1776, when the jury found a verdict for the plaintiff, damages £72 12s. costs 40s. subject to the opinion of the Court upon a special case stating the answer of the plaintiff in this action to a bill filed against him in the Exchequer by the present defendant for a discovery of the consideration of the note, the substance of which was as follows: "That on December 15th, 1774, the defendant, Fenton, purchased a quantity of linen of the plaintiff, Trueman, and it being usual to abate £5 per cent to persons of the defendant's trade, the price, after such abatement made, amounted to £126 18s. That at the time of the sale it was agreed that one half of the purchase-money should be paid at the end of six weeks, and the other half at the end of two months. And in consideration thereof the plaintiff, Trueman, drew two notes on the defendant for £63 9s. each, payable to his own order at six weeks and two months respectively. That the defendant accepted the notes, and thereupon the plaintiff gave him a discharge for the sum. He then denied that he had proved or claimed any debt or sum of money under the commission, but set forth that he acquainted the defendant he was surprised at his ungenerous behavior in purchasing so large a quantity of linen of him at the eve of his bankruptcy, and informed him he had paid away the above two notes, upon which the defendant pressed him to take up the two notes and proposed to give him a security for part of the debt. That afterward, on February 11th, 1775, the defendant called upon the

plaintiff, and voluntarily proposed to secure to him the payment of £67 in satisfaction of his debt, if he would take up the two notes and cancel or deliver them up to the defendant. That the plaintiff agreed to accept this proposal with the approbation of his attorney, and desired the note to be made payable to his brother, Joseph Trueman, or order three months after date. That he took up the two acceptances and delivered them to the defendant to be cancelled, and accepted the above note for £67 in satisfaction and discharge thereof. That a commission of bankruptcy issued against the defendant on January 19th, 1775, and that the bankrupt obtained his certificate on April 17th following." The question reserved was, Whether the facts above stated supported the merits of the defendant's plea? If they did not, then a verdict was to be entered for the plaintiff on the general issue. But if the merits of the second plea supported the defendant's case, then a verdict was to be entered for the defendant on that plea.

Buller for the plaintiff.

Davenport, contra, for the defendant.

LORD MANSFIELD. The plea put in in this case is that the debt was *due* at the time of the act of bankruptcy committed, and on that plea, in point of *form*, there was a strong objection made at the trial, that the allegation was not strictly true, because at the time of the sale credit was given to a future day, which day, as it appeared in evidence, was subsequent to the act of bankruptcy committed. To be sure on the *form* of the plea the defendant must fail. But I never like to entangle justice in matters of form, and to turn parties round upon frivolous objections where I can avoid it. It only tends to the ruin and destruction of both. I put it, therefore, to the counsel on the part of the plaintiff to give up the objection in point of form, and to take the opinion of the Court, whether according to the facts and truth of the case, the defendant could have pleaded his certificate in bar of the debt in question; and in case they had refused to do so, I should have left it to the jury upon the merits. The counsel for the plaintiff very properly gave up the point of form. The question, therefore, upon the case reserved is worded thus: Whether the facts support the merits of the defendant's plea—that is, whether on the merits of the case properly pleaded the certificate of the defendant would have been a bar to the plaintiff's action? Now in this case there is no fraud, no oppression, no scheme whatsoever on the part of the plaintiff to deceive or impose on the defendant; and as to collusion with respect to the certificate, where a creditor exacts terms of his debtor as the consideration for signing

his certificate, and obtains money or a part of his debt for so doing, the assignees may recover it back in an action. But that is not the case here. So far from it, the transaction itself excluded the plaintiff from having anything to do with the certificate. No man can vote for or against the certificate till he has proved his debt. Here the plaintiff delivers up the two drafts bearing date *prior* to the act of bankruptcy, and by agreement accepts *one* for little more than half their amount, bearing date *after* the commission of bankruptcy sued out. Most clearly therefore he could not have proved *that* note under the commission, and if not, he could have nothing to do with the certificate. That brings it to the general question whether a bankrupt, *after* a commission of bankruptcy sued out, may not, in consideration of a debt due *before* the bankruptcy, and for which the creditor agrees to accept no dividend or benefit under the commission, make such creditor a satisfaction in part or for the whole of his debt, by a new undertaking and agreement? A bankrupt may undoubtedly contract new debts; therefore, if there is an objection to his reviving an old debt by a new promise, it must be founded upon the ground of its being *nudum pactum*. As to that *all* the debts of a bankrupt are due *in conscience*, notwithstanding he has obtained his certificate, and there is no honest man who does not discharge them if he afterward has it in his power to do so. Though all legal remedy may be gone, the debts are clearly not extinguished in conscience. How far have the courts of equity gone upon these principles? Where a man devises his estate for payment of his debts, a court of equity says (and a court of law in a case properly before them would say the same) all debts barred by the statute of limitations shall come in and share the benefit of the devise, because they are due in conscience. Therefore, though barred by law, they shall be held to be revived and charged by the bequest. What was said in the argument relative to the reviving a promise at law, so as to take it out of the Statute of Limitations, is very true. The slightest acknowledgment has been held sufficient, as saying, "Prove your debt and I will pay you;" "I am ready to account, but nothing is due to you." And much slighter acknowledgments than these will take a debt out of the statute. So in the case of a man who, after he comes of age, promises to pay for goods or other things which, during his minority, one cannot say he has contracted for, because the law disables him from making any such contract; but which he has been fairly and honestly supplied with, and which were not merely to feed his extravagance, but reasonable for him (under his circumstances) to have; such promise shall

be binding upon him and make his former undertaking good. Let us see then what the transaction is in the present case. The bankrupt appears to me to have defrauded the plaintiff by drawing him in, on the eve of a bankruptcy, to sell him such a quantity of goods on credit. It was grossly dishonest in him to contract such a debt at a time when he must have known of his own insolvency, and which it is clear the plaintiff had not the smallest suspicion of, or he would not have given credit and a day of payment *in futuro*. On the other hand, what is the conduct of the plaintiff? He relinquishes all hope or chance of benefit from a dividend under the commission by forbearing to prove his debt, gives up the securities he had received from the bankrupt, and accepts of a note amounting to little more than half the real debt in full satisfaction of his whole demand. Is that against conscience? Is it not, on the contrary, a fair consideration for the note in question? He might foresee prospects from the way of life the bankrupt was in, which might enable him to recover this part of his debt, and he takes his chance, for till then he could get nothing by the mere imprisonment of his person. He uses no threats, no menace, no oppression, no undue influence, but the proposal first moves from and is the bankrupt's own voluntary request. The single question then is whether it is possible for the bankrupt in part or for the whole to revive the old debt. As to that, *Aston, J.*, has suggested to me the authority of *Bailey v. Dillon*, where the Court would not hold to special bail, but thought reviving the old debt was a good consideration. The two cases cited by Buller are very material. *Lewis v. Chase*, 1 P. Wms. 620, is much stronger than this, for that smelt of the *certificate*, and the Lord Chancellor's reasoning goes fully to the present question. Then the case of *Barnardiston v. Coupland*, in C. B., is in point. Lord Willes, C.J., there says "that the revival of an old debt is a sufficient consideration." That determines the whole case. Therefore I am of opinion that if the plea put in had been *formally* pleaded, the merits of the case would not have been sufficient to bar the plaintiff's demand.

ASTON, J. As a case of conscience, I am clearly of opinion that the plaintiff is entitled. Wherever a party waives his right to come in under the commission it is a benefit to the rest of the creditors. In the case of *Bailey v. Dillon*, the Court on the last day of the term were of opinion "that the defendant could not be held to special bail, yet they would not say that he might not revive the old debt, which was clearly due in conscience." A bankrupt may be, and is held to be discharged by his certificate from all debts due at the time of the commission, but still

he may make himself liable by a new promise. ✓ If he could not, the provision in the stat. 5 Geo. 2, ch. 30, § 11, by which every security for the payment of any debt due before the party became bankrupt as a consideration to a creditor to sign his certificate is made void would be totally nugatory. Lord Mansfield added that this observation was extremely forcible and strong.

Per CURIAM. Judgment for the plaintiff.

HAWKES AND WIFE v. SAUNDERS.

IN THE KING'S BENCH, HILARY TERM, JANUARY 28, 1782.

[*Reported in Cowper 289.*]

THIS action was brought against the defendant in her own right, and the declaration stated that George Saunders by his will bequeathed a legacy of £50 to the plaintiff; that he appointed the defendant his executrix; that she proved the will; that goods and chattels came to her hands more than sufficient to pay all the testator's debts and legacies, by reason whereof she became liable to pay the legacy, and being so liable, in consideration thereof she promised to pay it.

LORD MANSFIELD. This case does not at all involve in it the question whether a legatee has a general right to sue for a legacy in this Court.

Two objections have been made: First, that there can be no judgment in this case *de bonis testatoris*, because the action is not brought against the defendant as *executrix eo nomine*, but is a personal demand against her generally in her own right. As to that we are of opinion the objection is good, for the demand is certainly a personal demand against the defendant in consequence of a promise made by her, she being executrix.

It is admitted at the bar that after verdict it must be taken to have been a promise in writing and that there were assets. If so, the whole case is reduced to this single point, whether the circumstance of the defendant having assets sufficient to pay all the debts and legacies is or is not a sufficient consideration for her to make a promise to pay the legacy in question. As to that point, the rule laid down at the bar as to what is or is not a good consideration in law, goes upon a very narrow ground indeed—namely, that to make a consideration to support an *assumpsit*, there must be either an immediate benefit to

the party promising, or a loss to the person to whom the promise was made. I cannot agree to that being the only ground of consideration sufficient to raise an *assumpsit*.

Where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever actually made. *A fortiori*, a legal or equitable *duty*, is a sufficient consideration for an actual promise. Where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration. As if a man promise to pay a just debt, the recovery of which is barred by the Statute of Limitations ; or if a man, after he comes of age, promises to pay a meritorious debt contracted during his minority, but not for necessities ; or if a bankrupt, in affluent circumstances after his certificate, promises to pay the whole of his debts ; or if a man promise to perform a secret trust, or a trust void for want of writing by the Statute of Frauds.

In such and many other instances, though the promise gives a compulsory remedy, where there was none before either in law or equity, yet as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright mind are a sufficient consideration. But an executor who has received assets is under every kind of obligation to pay a legacy. He receives the money by virtue of an office which he swears to execute duly. He receives the money as a trust or deposit to the use of the legatee. He ought to assent if he has assets. He has no discretion or election. He retains what belongs to the legatee, and therefore owes him to the amount.

An account of assets or a judgment to pay out of assets is only necessary when the sufficiency of assets is uncertain. Where the sufficiency of assets received is certain, the executor's duty to pay a legatee follows by necessary consequence.

The legacy in such a case is a demand clearly due from the executor upon various grounds of natural and civil justice, and may be recovered from him by process of law. In such a case a promise to pay stands upon the strongest consideration.

Let us see, then, what the facts are in the present case. The executrix knows the state of her testator's affairs and of his property. It might consist of chattels which she might not choose to dispose of. It might consist of leases which she had no mind to sell, and having a full fund to pay the demand, which the plaintiff had a right to recover if he pleased, she, in consideration of that fund, promises to pay. I cannot think that this is *not* a sufficient consideration. I am of opinion it is amply sufficient. It is not like the case of *Rann v. Hughes*, for there there were no assets nor any averment of assets stated

in the declaration. But in this case there was a full fund, and therefore she was bound in law, justice, and conscience to pay the plaintiff his legacy.

WILLES and ASHHURST, JJ., were of the same opinion.

BULLER, J. I am entirely of the same opinion. That an action in the courts of Westminster Hall will, under some circumstances, lie for a legacy, is a question which I think can never admit of any serious doubt, for there are a number of cases in the books from the time of Henry VI. to the present time which prove that under different circumstances such action may be maintained. I think there is as little doubt but that the circumstances of the present case, as proved at the trial, were sufficient to sustain an action, for the legacy was to be paid out of land, and there was an *express assent* by the executrix to the legacy. But the evidence which was given at the trial is not now before the Court. We are to decide this case upon the face of the record alone.

The plaintiff in his declaration has not stated that the legacy was payable out of land, neither has he stated any assent by the executrix.

The action is brought against the defendant in her own right, and the declaration is simply that George Saunders by his will bequeathed a legacy to the plaintiff, and made the defendant executrix; that she proved the will and had *assets* sufficient to pay all the debts and legacies, and by reason thereof she became liable to pay the legacy, and being so liable, she promised to pay it.

To this declaration two objections have been made in arrest of judgment: First, that the defendant is not sufficiently described as executrix, and, therefore, there cannot be judgment *de bonis testatoris*; secondly, no judgment can be entered *de bonis propriis*, because there was no consideration for the promise, and therefore it is *nudum pactum*.

As to the first, I am of opinion that the plaintiff cannot upon this declaration take judgment *de bonis testatoris*. The action is brought against the defendant in her own right and not as executrix. It charges her with a personal promise to pay the legacy, and not upon a qualified promise to pay as executrix or out of assets. And the plaintiff having by his declaration made a personal demand against her, he must stand or fall by that, and cannot now resort to any demand that he may have upon her in the particular character of the executrix.

The forms of pleading are very different where a person is charged as executrix and where she is charged personally. In the first case, she is always named as executrix in the beginning

of the declaration. She is afterward stated to be liable as executrix, and the promise alleged to have been made by her as executrix. But in the other case she is charged generally as any other person, and a general charge is a personal charge.

This case, therefore, depends wholly upon the second question, whether there be a sufficient consideration alleged for the promise or whether the defendant's promise be merely *nudum pactum* and void.

The consideration stated for the promise is that the defendant was executrix, and that she had received assets more than sufficient to pay all the debts and legacies. The question is whether that be not a sufficient consideration.

Under those circumstances, if there had been no promise nor even an assent to the legacy, the defendant might have been compelled in a court of equity or in the ecclesiastical court to have paid it. Whether without assent she could be compelled in a court of law to pay it or not, is a question which it is not necessary to give any opinion upon now; and, therefore, though I have endeavored to trace out the jurisdiction and the authority of the ecclesiastical court from the earliest times, and though there is great reason to suppose that the jurisdiction which that court now possesses in matters of legacy was originally got by usurpation on the temporal courts, and though there is a wide difference between allowing to the ecclesiastical court a jurisdiction in such matters, and saying it shall have that jurisdiction exclusive of all other courts, I purposely avoid giving any opinion or even hinting what would be the result of my researches where there is no promise or assent.

I shall give my opinion singly on this point; whether an obligation in justice, equity, and conscience to pay a sum of money be or be not a sufficient consideration in point of law to support a promise to pay that sum.

If such a question were stripped of all authorities, it would be resolved by inquiring whether law were a rule of justice or whether it were something that acts in direct contradiction to justice, conscience, and equity. But the matter has been repeatedly decided.

In *Stone v. Withypool*, Latch. 21, the Court say: "It is an usual allegation for a rule that everything which is a ground for equity is a sufficient consideration." So in *Wells v. Wells*, 1 Vent. 41, the Court presumed an equitable right in the plaintiff, which did not appear on the declaration, and held that to debar herself of that was a good consideration.

These authorities alone are sufficient to show that the ground taken in the argument at the bar is not large enough.

But to come closer to the consideration now in question, in *Camden v. Turner* C. B. Sittings after Trin. 5 Geo. 1, King, C.J., held that an action for money had and received lay against an executor for a legacy, which he had owned lay ready for the plaintiff whenever he would call for it. In that case, according to the form of the declaration, the objection did not appear upon the record, but it was necessary for the plaintiff to prove a consideration at the trial, and if he had not, he must have been non-suited or have had a verdict against him. But Lord King held that his owing the money lay ready was an assent, and admission of assets, and a sufficient consideration.

In *Keech v. Kennegal*, 1 Vez. 125, Lord Hardwicke expressly holds that assets coming to an executor's hands is a sufficient consideration to support a promise, and he puts that case upon the same footing as a promise in consideration of forbearance. His Lordship says: "At law, if an executor promises to pay a debt of his testator's, a consideration must be alleged, as of assets come to his hands or of forbearance, or if admission of assets is implied by the promise; otherwise it will be but *nudum pactum* and not personally binding on the executor."

In *Trevinian v. Howel*, Cro. Eliz. 91, it was adjudged that having assets is a good consideration for a promise, and the judgment, which was *de bonis propriis*, was affirmed; and two other cases are there cited where the same point had been so determined. Lastly, the case of *Atkins v. Hill*, Easter, 15 Geo. 3, *supra* 284 is in point. The declaration was the same, and the objection the same as in the present case, and the Court unanimously held that the promise was good and that the action well lay.

I agree with my Lord, that the rule laid down at the bar, as to what is or is not a good consideration, is much too narrow. The true rule is that wherever a defendant is under a moral obligation, or is liable in conscience and equity to pay, that is a sufficient consideration. Some of the cases which I have mentioned go fully to that extent. But even if the narrow rule which has been mentioned were adopted as the true rule, yet in this case I think the consideration is sufficient, for here is both a loss to the plaintiff and a benefit to the defendant arising from that which is the consideration of the promise. The loss to the plaintiff is that the effects which are liable to the payment of the legacy have not been so applied, but the defendant has detained them in her own hands for other purposes. The benefit to the defendant is that she has received those effects and has them still. The defendant is bound in conscience to apply the effects toward the discharge of the debts and lega

cies. She is a trustee for that purpose, and is guilty of a breach of trust in not so doing; and it is admitted that a breach of trust is a good ground for action.

Therefore I agree in opinion with the rest of the Court, that this rule in arrest of judgment ought to be discharged.

Per CURIAM. Rule discharged.

LEE *v.* MUGGERIDGE AND ANOTHER, EXECUTORS OF
MARY MUGGERIDGE, DECEASED.

IN THE COMMON PLEAS, JUNE 29, 1813.

[*Reported in 5 Taunton 36.*]

THIS was an action of *assumpsit*, brought in consequence of Grant, M.R., having dismissed a bill filed by the same plaintiff against the same defendants to obtain payment of the bond hereinafter mentioned, but with liberty for the plaintiff to bring such action at law as he might be advised. 1 Ves. & Beames, 118. The plaintiff declared in this Court that before the making the bond thereafter mentioned, on November 21st, 1789, at London, etc., by indenture between John Muggeridge, 1, Mary, the deceased, by her then name of Mary Hiller, 2, and John Reynolds, clerk, and Stephen Reynolds, 3, after reciting that the said Mary was seized of and in, or well entitled unto the fee-simple in possession of a certain messuage, and that she was entitled to the sums of £3000 per cent bank annuities, and £2000 5 per cent bank annuities, and £2000 3 per cent South Sea annuities, and other debts, moneys, and effects; that a marriage was about to be had between John Muggeridge and Mary, and that the same sums had been transferred into and were then standing in the names of John and Stephen Reynolds, the said messuage, and all the rents, issues, and profits thereunto belonging, and all the estate and interest of Mary therein, were by such indenture granted and released by the said Mary to the said trustees, their heirs and assigns, to hold the same to them and their heirs, to the use of Mary, her heirs and assigns, until the marriage, and afterward to the use of the trustees, their heirs and assigns, during the joint lives of John Muggeridge and Mary Hiller, upon trust to pay and apply the rents, etc., thereof to Mary Hiller, or to such person or persons as she should from time to time, by any note or writing under her hand, direct and appoint to receive the same, during the joint

lives of husband and wife, for her sole and separate use, exclusive of her husband, and not subject or liable to his debts, control, or engagements, and the receipt of her, or of such person as she should so direct or appoint to receive the same, should, notwithstanding her coverture, be a good discharge for the same ; and after the decease of J. Muggeridge, in case Mary Hiller should survive him, to the use of her and her heirs and assigns forever ; but in case she should die in his lifetime, then to the use of such person, and for such estates, and subject to such limitations, etc., and annual or other charges, etc., and in such sort, manner, and form, as Mary by will, or by any writing in the nature of or purporting to be her will, by her signed and published as therein mentioned, should direct, limit, or appoint ; and in default of, until, and in complement of such direction, etc., and as and when the several estates, etc., thereby limited, etc., should cease and determine to the use of Hannah Hiller, daughter of Mary, in fee ; and a power of leasing the same premises in the manner therein mentioned was given to the trustees ; and the indenture also contained a clause whereby the trustees were empowered to sell the messuage in manner therein mentioned, and that the moneys arising from such sale should be placed out and invested at interest in the public funds or on government or real securities, in the names of the trustees and the survivor of them and the heirs, etc., of such survivor, to stand and be possessed thereof, and of the annual interest thereof, upon trust for such person as should have been entitled to the hereditaments, and the rents thereof, if the same had not been sold ; and it was thereby declared that the trustees should stand possessed and interested in the sums of stock so transferred into their names in trust for Mary Hiller until the marriage, and after the same, upon trust to pay her the interest, etc., thereof during the joint lives of herself and J. Muggeridge, for her sole and separate use, exclusive of J. Muggeridge, and not to be subject to his debts, control, or engagements, and her receipts for the same were to be a sufficient discharge for the same to the trustees, notwithstanding her coverture, and from and after the husband's death, in case she should survive him, then upon trust for her, her executors, administrators, and assigns ; but in case she should die in the husband's lifetime, upon trust at all times after her decease, to assign and transfer the several and respective funds to such persons, in such shares, and to and for such intents, etc., and subject to such powers, etc., as Mary Hiller, notwithstanding her coverture by will, or by any writing in the nature of, or purporting to be her will, to be executed and attested as therein mentioned, should de-

clare, limit, direct, or appoint ; and in default thereof, upon trust to pay, transfer, and assign the same unto Hannah Hiller, her executors, etc., for her and their own proper use and benefit ; and that the intended marriage afterward took effect between the said J. Muggeridge and Mary, and that after such marriage had, and during the respective lives of John and Mary, to wit, on August 14th, 1799, at London, Mary, by her certain writing obligatory, sealed with her seal, acknowledged herself to be held and firmly bound to the plaintiff in the penal sum of £4000, under a condition thereto subscribed, whereby, after reciting that J. Hiller, son-in-law of the said Mary, had applied to her to advance and lend him the sum of £1999 19s., which not being convenient to her to do, she had applied to the plaintiff to advance the same, to which he had consented on having her bond as above written, and had accordingly advanced to J. Hiller, before the sealing and delivery thereof, the sum of £500, and had also advanced and lent to him by good bills, to Joseph Hiller's satisfaction, the further sum of £1499 19s., making in the whole £1999 19s. ; then the condition of the same was that if the heirs, executors, or administrators of Mary did and should, within six months after her decease, pay unto the plaintiff, etc., the full sum of £1999 19s., together with interest for the same at the rate of £5 per cent per annum, or so much of the principal or interest thereof as J. Hiller should have omitted to pay (it being agreed that he should regularly pay the interest thereof to the plaintiff half-yearly, as the same should become due), then the said bond to be void, and the plaintiff averred that he did advance to J. Hiller, before the delivery of such bond, £500, and did also in Mary's lifetime, and before the making her promise and undertaking next mentioned, advance and lend to J. Hiller, by good bills to his satisfaction, divers other large sums amounting in the whole to £1499 19s., making in the whole £1999 19s., whereof Mary had notice, and that Joseph omitted to pay any part of the principal, and paid interest thereon only up to July 1st, 1801 ; he then averred the death of J. Muggeridge afterward and before the promise of Mary next mentioned, that she survived him, and that the principal sum of £1999 19s., so lent by the plaintiff to J. Hiller, and for securing the repayment of which and interest Mary so made and delivered the aforesaid writing obligatory, and all interest thereon from July 1st, 1801, being and remaining wholly unpaid, and Mary having full knowledge and notice of the premises, she afterward, and after the death of her husband, J. Muggeridge, and while she was sole, and a widow, to wit, on July 11th, 1804, at London, etc., in consider-

ation of the premises, undertook to the plaintiff that the bond (that is to say), the principal money and interest secured by the bond should be settled (that is to say), paid, by her executors ; and the plaintiff further averred that Mary afterward, to wit, on April 28th, 1811, at London, etc., died, having first duly made and published her last will and testament in writing, and thereby, after devising the message to the defendant, Nathaniel Muggeridge, in fee, and after giving several legacies as therein particularly mentioned, gave and bequeathed, subject to such legacies and to the payment of her just debts, funeral and testamentary expenses, all the residue of her estate and effects, real and personal, to the defendant, Nathaniel Muggeridge, and thereby appointed the two defendants executors thereof, who afterward duly proved the same, and took upon themselves the burden of the execution thereof ; and the plaintiff further averred that the said principal money, and interest from the time aforesaid, at the time of the death of Mary was, and still was wholly unpaid, and that divers goods, chattels, and effects, rights, and credits, which were of Mary, the deceased, at the time of her death, more than sufficient to satisfy the principal and interest and all the other just debts of Mary had come to and been in the hands of the defendants, as executors, to be administered ; and that the defendants, as such executors, afterward, and after the expiration of six months from the death of the said Mary, to wit, on November 1st, 1811, at London, etc., had notice of all and singular the premises, and were then requested by the plaintiff to settle the bond (that is to say), to pay the principal money, and interest so omitted to be paid by J. Hiller, according to the form and effect of such promise and undertaking of Mary in her lifetime so by her made, but that they, not regarding such promise and undertaking of Mary, did not nor would, when so requested, or at any time since, settle such bond, or pay the principal and interest, and the same remained wholly unpaid. There was another count, omitting the statement of the settlement, and stating the bond to be given in consideration of the loan made to Joseph Hiller, and the death of John Muggeridge, the husband, and the survivorship and subsequent promise, will, and decease of Mary, probate, the possession of assets, notice, request, and refusal of the executors. The third count stated a promise made by the deceased while she was sole and a widow, in consideration of money before then advanced to Joseph Hiller at her request, her subsequent will and death, and probate, the possession of assets, notice, request, and refusal to pay by the executors. There were other counts, varying the statement,

and counts upon an account stated with the deceased. The defendant pleaded the general issue. Upon the trial of the cause at the sittings after Hilary Term, 1813, at Guildhall, before Gibbs, J., the transaction was proved as stated in the first count, so far as related to the settlement, loan, and bond, a letter was proved, written by the deceased during her widowhood, addressed to the plaintiff, stating "that it was not in her power to pay the bond off, her time here was but short, and that would be settled by her executors." The jury found a verdict for the plaintiff, which at the time of the trial was entered generally upon the whole declaration.

Shepherd, in Easter Term last, moved that the plaintiff might be compelled to enter his verdict upon one count only.

Per CURIAM. It is hard upon a counsel to be compelled to elect at *nisi prius*, in the hurry of the cause, upon what count he will take his verdict, but he ought afterward to make an election.

Lens, for the plaintiff, electing the first count, *Shepherd* moved in arrest of judgment, on the ground that no sufficient consideration was shown for the promise of the deceased. The Court granted a rule *nisi*.

Lens and *Best* in this term showed cause.

Shepherd and *Vaughan*, *contra*.

MANSFIELD, C.J. The counsel for the plaintiff need not trouble themselves to reply to these cases; it has been long established, that where a person is bound morally and conscientiously to pay a debt, though not legally bound, a subsequent promise to pay will give a right of action. The only question therefore is, whether upon this declaration there appears a good moral obligation. Now I cannot conceive that there can be a stronger moral obligation than is stated upon this record. Here is this debt of £2000 created at the desire of the testatrix, lent in fact to her, though paid to Hiller. After her husband's death, she knowing that this bond had been given, that her son-in-law had received the money, and had not repaid it; knowing all this, she promises that her executors shall pay; if then it has been repeatedly decided that a moral consideration is a good consideration for a promise to pay this declaration is clearly good. This case is not distinguishable in principle from *Barnes v. Hedley*; there not only the securities were void, but the contract was void; but the money had been lent, and therefore when the parties had stripped the transaction of its usury, and reduced the debt to mere principal and interest, the promise made to pay that debt was binding. Lord Mansfield's judgment in the case of *Doe on the demise of Carter v. Straphan*

is extremely applicable. Here in like manner the wife would have been grossly dishonest if she had scrupled to give a security for the money advanced at her request. As to the cases cited, of *Lloyd v. Lee* and *Barber v. Fox*, there was no forbearance, and those cases proceeded on the ground that no good cause of action was shown on the pleadings.

HEATH, J. I am of the same opinion. Promises without consideration are not enforced, because they are gratuitous, and the law leaves the performance to the liberality of the makers. The notion that a promise may be supported by a moral obligation is not modern ; in Charles the Second's time it was said, if there be an iota of equity it is enough consideration for the promise. ✓

CHAMBRE, J. There cannot be a stronger or clearer case of moral obligation than this. The gentleman has done this lady a great favor in going to this expense and accepting an invalid security ; and when she could give a better security, it became her duty so to do, and she has done it. In the cases cited it was the plaintiff's fault if, having it in his power to state a good consideration on the record, he neglected so to do.

GIBBS, J. I agree in this case the plaintiff is entitled to recover. It cannot, I think, be disputed now that wherever there is a moral obligation to pay a debt, or perform a duty, a promise to perform that duty, or pay that debt, will be supported by the previous moral obligation. There cannot be a stronger case than this of moral obligation. The counsel for the defendant did not dare to grapple with this position, but endeavored to show that there was no case, in which a subsequent promise had been supported, where there had not been an antecedent legal obligation at some time or other ; from whence he wished it to be inferred, that unless there had been the antecedent legal obligation, the mere moral obligation would not be a sufficient consideration to support the promise. But in *Barnes v. Hedley*, certainly Hedley never was for a moment legally bound to pay a farthing of that money for which he was sued ; for it appears to have been advanced upon a previously existing usurious contract, and whatever was advanced upon such a contract certainly could not be recovered at any one moment. The borrower, availing himself of the law, so far as he honestly might, and no further, reducing it to mere principal and interest, does that which every honest man ought to do in like circumstances, promises to pay it, and that promise was held binding. As to the cases of *Lloyd v. Lee* and *Barber v. Fox*, they have sufficiently been answered by my Lord and my Brother Chambre, that if a man will state on his declaration a

consideration which is no consideration, and shows no other consideration on his declaration, although another good consideration may exist, when that which he does show fails, he cannot succeed upon the proof of the other which he has not alleged. Now in the first of those cases there was clearly no forbearance, because forbearance must be a deferring to prosecute a legal right, but no legal right to recover previously existed. Whatever other consideration might exist for the promise, it was not stated in the declaration ; it is therefore clear that this rule must be discharged upon the ground, that wherever there is an antecedent moral obligation, and a subsequent promise given to perform it, it is of sufficient validity for the plaintiff to be able to enforce it.

Rule discharged.

DANIEL MILLS v. SETH WYMAN.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS,
APRIL TERM, 1826.

[*Reported in 3 Pickering 207.*]

THIS was an action of *assumpsit* brought to recover a compensation for the board, nursing, etc., of Levi Wyman, son of the defendant from February 5th to the 20th, 1821. The plaintiff then lived at Hartford, in Connecticut ; the defendant, at Shrewsbury, in this county. Levi Wyman, at the time when the services were rendered, was about twenty-five years of age, and had long ceased to be a member of his father's family. He was on his return from a voyage at sea, and being suddenly taken sick at Hartford, and being poor and in distress, was relieved by the plaintiff in the manner and to the extent above stated. On February 24th, after all the expenses had been incurred, the defendant wrote a letter to the plaintiff, promising to pay him such expenses. There was no consideration for this promise, except what grew out of the relation which subsisted between Levi Wyman and the defendant, and Howe, J., before whom the cause was tried in the Court of Common Pleas, thinking this not sufficient to support the action, directed a nonsuit. To this direction the plaintiff filed exceptions.

J. Davis and *Allen* in support of the exceptions.

The opinion of the Court was read, as drawn up by

PARKER, C.J. General rules of law established for the protection and security of honest and fair-minded men, who may

inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound in *foro conscientie* to perform. This is a defect inherent in all human systems of legislation. The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application, and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful.

The promise declared on in this case appears to have been made without any legal consideration. The kindness and services toward the sick son of the defendant were not bestowed at his request. The son was in no respect under the care of the defendant. He was twenty-five years old, and had long left his father's family. On his return from a foreign country, he fell sick among strangers, and the plaintiff acted the part of the good Samaritan, giving him shelter and comfort until he died. The defendant, his father, on being informed of this event, influenced by a transient feeling of gratitude, promises in writing to pay the plaintiff for the expenses he had incurred. But he has determined to break this promise, and is willing to have his case appear on record as a strong example of particular injustice sometimes necessarily resulting from the operation of general rules.

It is said a moral obligation is a sufficient consideration to support an express promise; and some authorities lay down the rule thus broadly; but upon examination of the cases we are satisfied that the universality of the rule cannot be supported, and that there must have been some pre-existing obligation, which has become inoperative by positive law, to form a basis for an effective promise. The cases of debts barred by the Statute of Limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such pre-existing equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a *quid pro quo*; and according to the principles of natural justice the party receiving ought to pay; but the legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon an antecedent valuable consideration. These promises therefore

have a sound legal basis. They are not promises to pay something for nothing ; not naked pacts ; but the voluntary revival or creation of obligation which before existed in natural law, but which had been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience. If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the *interior* forum, as the tribunal of conscience has been aptly called. Is there not a moral obligation upon every son who has become affluent by means of the education and advantages bestowed upon him by his father, to relieve that father from pecuniary embarrassment, to promote his comfort and happiness, and even to share with him his riches, if thereby he will be made happy ? And yet such a son may, with impunity, leave such a father in any degree of penury above that which will expose the community in which he dwells, to the danger of being obliged to preserve him from absolute want. Is not a wealthy father under strong moral obligation to advance the interest of an obedient, well-disposed son, to furnish him with the means of acquiring and maintaining a becoming rank in life, to rescue him from the horrors of debt incurred by misfortune ? Yet the law will uphold him in any degree of parsimony, short of that which would reduce his son to the necessity of seeking public charity.

Without doubt there are great interests of society which justify withholding the coercive arm of the law from these duties of imperfect obligation, as they are called ; imperfect, not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them.

A deliberate promise, in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity. And in the case of the promise of the adult to pay the debt of the infant, of the debtor discharged by the Statute of Limitations or Bankruptcy, the principle is preserved by looking back to the origin of the transaction, where an equivalent is to be

found. An exact equivalent is not required by the law ; for there being a consideration, the parties are left to estimate its value : though here the courts of equity will step in to relieve from gross inadequacy between the consideration and the promise.

These principles are deduced from the general current of decided cases upon the subject, as well as from the known maxims of the common law. The general position, that moral obligation is a sufficient consideration for an express promise, is to be limited in its application to cases where at some time or other a good or valuable consideration has existed.

A legal obligation is always a sufficient consideration to support either an express or an implied promise ; such as an infant's debt for necessities, or a father's promise to pay for the support and education of his minor children. But when the child shall have attained to manhood, and shall have become his own agent in the world's business, the debts he incurs, whatever may be their nature, create no obligation ; and it seems to follow, that a promise founded upon such a debt has no legally binding force.

The cases of instruments under seal and certain mercantile contracts, in which considerations need not be proved, do not contradict the principles above suggested. The first import a consideration in themselves, and the second belong to a branch of the mercantile law, which has found it necessary to disregard the point of consideration in respect to instruments negotiable in their nature and essential to the interests of commerce.

Instead of citing a multiplicity of cases to support the positions I have taken, I will only refer to a very able review of all the cases in the note in 3 B. & P. 249. The opinions of the judges had been variant for a long course of years upon this subject, but there seems to be no case in which it was nakedly decided, that a promise to pay the debt of a son of full age, not living with his father, though the debt were incurred by sickness which ended in the death of the son, without a previous request by the father proved or presumed, could be enforced by action.

It has been attempted to show a legal obligation on the part of the defendant by virtue of our statute, which compels lineal kindred in the ascending or descending line to support such of their poor relations as are likely to become chargeable to the town where they have their settlement. But it is a sufficient answer to this position, that such legal obligation does not exist except in the very cases provided for in the statute, and never until the party charged has been adjudged to be of sufficient ability thereto. We do not know from the report any of the

facts which are necessary to create such an obligation. Whether the deceased had a legal settlement in this commonwealth at the time of his death, whether he was likely to become chargeable had he lived, whether the defendant was of sufficient ability, are essential facts to be adjudicated by the Court to which is given jurisdiction on this subject. The legal liability does not arise until these facts have all been ascertained by judgment, after hearing the party intended to be charged.

For the foregoing reasons we are all of opinion that the nonsuit directed by the Court of Common Pleas was right, and that judgment be entered thereon for costs for the defendant.

LITTLEFIELD, EXECUTRIX OF JOHN LITTLEFIELD, v.
ELIZABETH SHEE.

IN THE KING'S BENCH, NOVEMBER 4, 1831.

[*Reported in 2 Barnewall & Adolphus 811.*]

ASSUMPSIT for goods sold and delivered. The fourth count stated that John Littlefield, in his lifetime, at the special instance and request of the defendant, had supplied and delivered to her divers goods and chattels for the sum of £16; and thereupon, in consideration of the premises, and of the said sum of money being due and unpaid, the defendant, after the death of the said John Littlefield, undertook and promised the plaintiff, as executrix of John Littlefield, to pay her the said sum of money as soon as it was in her (the defendant's) power so to do; and, although afterward, to wit, on, etc., at, etc., it was in her power to pay the said sum, yet she did not do so. Plea, the general issue. At the trial before Gaselee, J., at the last assizes for Sussex, it appeared that the action was brought to recover £15 for butcher's meat supplied by the testator to the defendant, for her own use, between September, 1825, and March, 1826. During that time the defendant was a married woman, but her husband was abroad. After his death she promised to pay the debt when it should be in her power, and her ability to pay was proved at the trial. The learned judge held that the defendant having been a *feme covert* at the time when the goods were supplied, her husband was originally liable, and, consequently, there was no consideration for the promise declared upon. The plaintiff was therefore nonsuited. Hutchinson on a former day in this term moved to set aside the

nonsuit, and to enter a verdict for the plaintiff on the fourth count ; on the ground that, the goods having been supplied to the defendant while she was living separate from her husband, she was under a moral obligation to pay for them, and such obligation was a sufficient consideration for a subsequent promise. It was not necessary that there should have been an antecedent legal obligation. *Barnes v. Hedley*,¹ *Lee v. Muggeridge*.²

LORD TENTERDEN, C.J., now delivered the judgment of the Court. The fourth count of the declaration states that the testator had, at the request of the defendant, supplied her with goods, and that in consideration of the premises, and of the price of the goods being due and unpaid, the defendant promised. Now that is in substance an allegation that those sums were due from her, and the plaintiff failed in proof of that allegation, because it appeared that the goods were supplied to her while her husband was living, so that the price constituted a debt due from him. We are, therefore, of opinion that the declaration was not supported by the proof, and that the nonsuit was right. In *Lee v. Muggeridge*,³ all the circumstances which showed that the money was, in conscience, due from the defendant were correctly set forth in the declaration. It there appeared upon the record that the money was lent to her, though paid to her son-in-law, while she was a married woman, and that after her husband's death, she, knowing all the circumstances, promised that her executor should pay the sum due on the bond. I must also observe that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise is one which should be received with some limitation. Rule refused.

EASTWOOD v. KENYON.

IN THE QUEEN'S BENCH, JANUARY 16, 1840.

[*Reported in 11 Adolphus & Ellis 438.*]

ASSUMPSIT. The declaration stated that one John Sutcliffe made his will, and appointed plaintiff executor thereof, and thereby bequeathed certain property in manner therein mentioned ; that he afterward died without altering his will, leaving one Sarah Sutcliffe, an infant, his daughter and only child and heiress at law, surviving ; that after making the will John Sutcliffe sold the property mentioned therein, and purchased a piece of land upon which he erected certain cottages, but the

¹ 2 Taunt. 184.

² 5 Taunt. 36.

³ *Ibid.*

same were not completed at the time of his death, which piece of land and cottages were at the time of his death mortgaged by him ; that he died intestate in respect of the same, whereupon the equity of redemption descended to the said infant as heiress, at law ; that after the death of John Sutcliffe, plaintiff duly proved the will and administered to the estate of the deceased ; that from and after the death of John Sutcliffe until the said Sarah Sutcliffe came of full age, plaintiff, executor as aforesaid, "acted as the guardian and agent" of the said infant, and in that capacity expended large sums of money in and about her maintenance and education, and in and about the completion, management, and necessary improvement of the said cottages and premises in which the said Sarah Sutcliffe was so interested, and in paying the interest of the mortgage money chargeable thereon and otherwise relative thereto, the said expenditure having been made in a prudent and useful manner, and having been beneficial to the interest of the said Sarah Sutcliffe to the full amount thereof ; that the estate of John Sutcliffe deceased having been insufficient to allow plaintiff to make the said payments out of it, plaintiff was obliged to advance out of his own moneys, and did advance, a large sum, to wit, £140, for the purpose of the said expenditure ; and, in order to reimburse himself, was obliged to borrow, and did borrow, the said sum of one A. Blackburn, and, as a security, made his promissory note for payment thereof to the said A. Blackburn or his order on demand with interest ; which sum, so secured by the said promissory note, was at the time of the making thereof and still is wholly due and unpaid to the said A. Blackburn ; that the said sum was expended by plaintiff in manner aforesaid for the benefit of the said Sarah Sutcliffe, who received all the benefit and advantage thereof, and such expenditure was useful and beneficial to her to the full amount thereof ; that when the said Sarah Sutcliffe came of full age she had notice of the premises, and then assented to the loan so raised by plaintiff, and the security so given by him, and requested plaintiff to give up to one J. Stansfield as her agent, the control and management of the said property, and then promised the plaintiff to pay and discharge the amount of the said note ; and thereupon caused one year's interest upon the said sum of £140 to be paid to A. Blackburn. That thereupon plaintiff agreed to give up, and did then give up, the control and management of the property to the said agent on behalf of the said Sarah Sutcliffe ; that all the services of plaintiff were done and given by him for the said Sarah Sutcliffe, and for her benefit, gratuitously and without any fee, benefit, or reward

whatsoever; and the said services and expenditure were of great benefit to her, and her said property was increased in value by reason thereof to an amount far exceeding the said £140. That afterward defendant intermarried with the said Sarah Sutcliffe, and had notice of the premises, and the accounts of plaintiff of and concerning the premises were then submitted to defendant, who then examined and assented to the same, and upon such accounting there was found to be due to plaintiff a large sum of money, to wit, etc., for moneys so expended and borrowed by him as aforesaid; and it also then appeared that plaintiff was indebted to A. Blackburn in the amount of the said note. That defendant, in right of his wife, had and received all the benefit and advantage arising from the said services and expenditure. That thereupon in consideration of the premises defendant promised plaintiff that he would pay and discharge the amount of the said promissory note; but that, although a reasonable time for paying and discharging the said note had elapsed, and A. Blackburn, the holder thereof, was always willing to accept payment from defendant, and defendant was requested by plaintiff to pay and discharge the amount thereof, defendant did not, nor would then, or at any other time pay or discharge the amount, etc., but wholly refused, etc.

Plea: *Non assumpsit*.

On the trial before Patteson, J., at the York spring assizes, 1838, it was objected on the part of the defendant that the promise stated in the declaration, and proved, was a promise to pay the debt of another within the Statute of Frauds, 29 Car. 2, ch. 3, § 4, and ought to have been in writing; on the other hand, it was contended that such defence, if available at all, was not admissible under the plea of *non assumpsit*. The learned judge was of the latter opinion, and the plaintiff had a verdict, subject to a motion to enter a verdict for the defendant.

Cresswell, in the following term, obtained a rule *nisi* according to the leave reserved, and also for arresting judgment on the ground that the declaration showed no consideration for the promise alleged. In Trinity Vacation, 1839,¹

Alexander and W. H. Watson showed cause.

Cresswell, contra.

LORD DENMAN, C.J. The first point in this case arose on the fourth section of the Statute of Frauds—viz., whether the promise of the defendant was to “answer for the debt, default, or miscarriage of another person.” Upon the hearing we decided,

¹ June 19th. Before Lord Denman, C.J., Patteson, Williams, and Coleridge, JJ.

in conformity with the case of *Buttemere v. Hayes*,¹ that this defence might be set up under the plea of *non assumpsit*.

The facts were that the plaintiff was liable to a Mr. Blackburn on a promissory note ; and the defendant, for a consideration, which may for the purpose of the argument be taken to have been sufficient, promised the plaintiff to pay and discharge the note to Blackburn. If the promise had been made to Blackburn, doubtless the statute would have applied ; it would then have been strictly a promise to answer for the debt of another ; and the argument on the part of the defendant is, that it is not less the debt of another because the promise is made to that other—viz., the debtor, and not to the creditor, the statute not having in terms stated to whom the promise, contemplated by it, is to be made. But upon consideration we are of opinion that the statute applies only to promises made to the person to whom another is answerable. We are not aware of any case in which the point has arisen, or in which any attempt has been made to put that construction upon the statute which is now sought to be established, and which we think not to be the true one.

The second point arose in arrest of judgment—namely, whether the declaration showed a sufficient consideration for the promise. It stated, in effect, that the plaintiff was executor under the will of the father of the defendant's wife, who had died intestate as to his real estate, leaving the defendant's wife, an infant, his only child ; that the plaintiff had voluntarily expended his money for the improvement of the real estate, while the defendant's wife was sole and a minor ; and that, to reimburse himself, he had borrowed money of Blackburn, to whom he had given his promissory note ; that the defendant's wife, while sole, had received the benefit, and, after she came of age, assented and promised to pay the note, and did pay a year's interest ; that after the marriage the plaintiff's accounts were shown to the defendant, who assented to them, and it appeared that there was due to the plaintiff a sum equal to the amount of the note to Blackburn ; that the defendant in right of his wife had received all the benefit, and, in consideration of the premises, promised to pay and discharge the amount of the note to Blackburn.

Upon motion in arrest of judgment, this promise must be taken to have been proved, and to have been an express promise, as indeed it must of necessity have been, for no such implied promise in law was ever heard of. It was then argued for the plaintiff that the declaration disclosed a sufficient moral consideration to support the promise.

¹ 5 Mee. & W. 456.

Most of the older cases on this subject are collected in a learned note to the case of *Wennall v. Adney*,¹ and the conclusion there arrived at seems to be correct in general, "that an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original cause of action, if the obligation, on which it is founded, never could have been enforced at law, though not barred by any legal maxim or statute provision." Instances are given of voidable contracts, as those of infants ratified by an express promise after age, and distinguished from void contracts, as of married women, not capable of ratification by them when widows; *Lloyd v. Lee*;² debts of bankrupts revived by subsequent promise after certificate, and similar cases. Since that time some cases have occurred upon this subject, which require to be more particularly examined. *Barnes v. Hedley*³ decided that a promise to repay a sum of money, with legal interest, which sum had originally been lent on usurious terms, but, in taking the account of which, all usurious items had been by agreement struck out, was binding. *Lee v. Muggeridge*⁴ upheld an *assumpsit* by a widow that her executors should pay a bond given by her while a *feme covert* to secure money then advanced to a third person at her request. On the latter occasion the language of Mansfield, C.J., and of the whole Court of Common Pleas, is very large, and hardly susceptible of any limitation. It is conformable to the expressions used by the judges of this Court in *Cooper v. Marten*,⁵ where a stepfather was permitted to recover from the son of his wife, after he had attained his full age, upon a declaration for necessities furnished to him while an infant, for which, after his full age, he promised to pay. It is remarkable that in none of these there was any allusion made to the learned note in 3 *Bosanquet & Puller* above referred to, and which has been very generally thought to contain a correct statement of the law. The case of *Barnes v. Hedley*⁶ is fully consistent with the doctrine in that note laid down. *Cooper v. Martin*⁷ also, when fully examined, will be found not to be inconsistent with it. This last case appears to have occupied the attention of the Court much more in respect of the supposed statutable liability of a stepfather, which was denied by the Court, and in respect

¹ 3 B. & P. 249.² 1 Stra. 94.³ 2 Taunt. 184.⁴ 5 Taunt. 36. On a previous suit in equity to declare the bond a charge on the separate estate of the testatrix, the Master of the Rolls had refused relief. S. C. 1 V. & B. 118.⁵ 4 East, 76.⁶ 2 Taunt. 184.⁷ 4 East, 76.

of what a court of equity would hold as to a stepfather's liability, and rather to have assumed the point before us. It should, however, be observed that Lord Ellenborough in giving his judgment says: "The plaintiff having done an act beneficial for the defendant in his infancy, it is a good consideration for the defendant's promise after he came of age. In such a case the law will imply a request, and the fact of the promise has been found by the jury;" and undoubtedly the action would have lain against the defendant while an infant, inasmuch as it was for necessities furnished at his request, in regard to which the law raises an implied promise. The case of *Lee v. Muggeridge*¹ must, however, be allowed to be decidedly at variance with the doctrine in the note alluded to, and is a decision of great authority. It should, however, be observed that in that case there was an actual request of the defendant during coverture, though not one binding in law; but the ground of decision there taken was also equally applicable to *Littlefield v. Shee*,² tried by Gaselee, J., at N. P., when that learned judge held, notwithstanding, that "the defendant having been a married woman when the goods were supplied, her husband was originally liable, and there was no consideration for the promises declared upon." After time taken for deliberation this Court refused even a rule to show cause why the nonsuit should not be set aside. *Lee v. Muggeridge*³ was cited on the motion, and was sought to be distinguished by Lord Tenterden, because there the circumstances raising the consideration were set out truly upon the record; but in *Littlefield v. Shee* the declaration stated the consideration to be that the plaintiff had supplied the defendant with goods at her request, which the plaintiff failed in proving, inasmuch as it appeared that the goods were in point of law supplied to the defendant's husband, and not to her. But Lord Tenterden added that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise is one which should be received with some limitation. This sentence, in truth, amounts to a dissent from the authority of *Lee v. Muggeridge*,⁴ where the doctrine is wholly unqualified.

The eminent counsel who argued for the plaintiff in *Lee v. Muggeridge*⁵ spoke of Lord Mansfield as having considered the rule of *nudum pactum* as too narrow, and maintained that all promises deliberately made ought to be held binding. I do not find this language ascribed to him by any reporter, and do not know whether we are to receive it as a traditional report,

¹ 5 Taunt. 36.

² 2 B. & Ad. 811.

³ 5 Taunt. 36.

⁴ 5 Taunt. 36.

⁵ *Ibid.*

or as a deduction from what he does appear to have laid down. If the latter, the note to Wennall v. Adney¹ shows the deduction to be erroneous. If the former, Lord Tenterden and this Court declared that they could not adopt it in Littlefield v. Shee.² Indeed the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.

The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society ; one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would also be multiplied, to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult.

Taking, then, the promise of the defendant, as stated on this record, to have been an express promise, we find that the consideration for it was past and executed long before, and yet it is not laid to have been at the request of the defendant, nor even of his wife while sole (though if it had, the case of Mitchinson v. Hewson³ shows that it would not have been sufficient), and the declaration really discloses nothing but a benefit voluntarily conferred by the plaintiff and received by the defendant, with an express promise by the defendant to pay money.

If the subsequent assent of the defendant could have amounted to a *ratihabitio*, the declaration should have stated the money to have been expended at his request, and the ratification should have been relied on as matter of evidence ; but this was obviously impossible, because the defendant was in no way connected with the property or with the plaintiff, when the money was expended. If the ratification of the wife while sole were relied on, then a debt from her would have been shown, and the defendant could not have been charged in his own right without some further consideration, as of forbearance after marriage, or something of that sort ; and then another point would have arisen upon the Statute of Frauds which did not arise as it was, but which might in that case have been available under the plea of *non assumpsit*.

In holding this declaration bad because it states no consideration but a past benefit not conferred at the request of the defendant, we conceive that we are justified by the old common law of England.

¹ 3 B. & P. 249.

² 2 B. & Ad. 811.

³ 7 T. R. 345.

Lampleigh *v.* Brathwait¹ is selected by Smith² as the leading case on this subject, which was there fully discussed, though not necessary to the decision. Hobart, C.J., lays it down that "a mere voluntary courtesy will not have a consideration to uphold an *assumpsit*. But if that courtesy were moved by a suit or request of the party that gives the *assumpsit*, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit; which is the difference;" a difference brought fully out by Hunt *v.* Bate,³ there cited from Dyer, where a promise to indemnify the plaintiff against the consequences of having bailed the defendant's servant, which the plaintiff had done without request of the defendant, was held to be made without consideration; but a promise to pay £20 to plaintiff, who had married defendant's cousin, but at defendant's special instance, was held binding.

The distinction is noted, and was acted upon, in Townsend *v.* Hunt,⁴ and indeed in numerous old books; while the principle of moral obligation does not make its appearance till the days of Lord Mansfield, and then under circumstances not inconsistent with this ancient doctrine when properly explained.

Upon the whole, we are of opinion that the rule must be made absolute to arrest the judgment.

Rule to enter verdict for defendant discharged.

Rule to arrest judgment absolute.

SNEVILY *v.* READ.

IN THE SUPREME COURT OF PENNSYLVANIA, MAY TERM, 1840.

[*Reported in 9 Watts 396.*]

ERROR to the Common Pleas of Dauphin County.

Alexander Read, surviving James Gray, *v.* John Snevily. This was an action of *assumpsit* in which the following declaration was filed:

"John Snevily, late of the county aforesaid, yeoman, was summoned to answer Alexander Read, surviving James Gray, deceased, of a plea of trespass on the case, etc. Whereupon the said Alexander, by his attorney, complains that whereas, on March 15th, 1830, A.D., Alexander Read aforesaid, and James

¹ Hob. 105.

² 1 Smith's Leading Cases, 67.

³ Dyer, 272a.

⁴ Cro. Car. 408.

Gray, under the name and firm of Read & Gray, recovered a judgment in the Common Pleas of the county of Schuylkill, against the said John Snevily, for the sum of \$285.82 debt, and \$5.62 costs, being numbered on the records of said Court 62, of March Term, 1830, A.D.; and whereas a writ of execution called a *testatum capias ad satisfaciendum* was sued out by said Read & Gray upon said judgment, directed to the sheriff of the county of Dauphin, No. 75 of July Term, 1832, against him the said John Snevily, for the said debt and costs, and the said writ of execution being delivered to the said sheriff of Dauphin County, he, the said sheriff, arrested the said John Snevily at Harrisburg, in the said county of Dauphin, before the return day of the said writ of execution, to wit, on June 27th, 1832, A.D., and the said John Snevily, being then and there so arrested, and in custody of the said sheriff, Samuel Shoch, Esq., the attorney for the said Read & Gray, at the special instance and request of him, the said John Snevily, discharged him, the said John Snevily, from the arrest and custody of the said sheriff on the said execution, without the said John Snevily having paid or satisfied the said debt and cost or any part thereof, and the said sheriff then and there made return of the said writ of execution, to the said Court of Common Pleas of Schuylkill County that he had taken the body of the said John Snevily, and that he, the said John Snevily, was discharged by S. Shoch, Esq., attorney for the said Read & Gray, whereby the said judgment of them, the said Read & Gray, against the said John Snevily in the said Court of Common Pleas of Schuylkill County became satisfied and extinct.

“ And whereas, afterward, to wit, on January 1st, 1839, A.D., at the county aforesaid, the said debt of \$285.82, with interest from the said March 15th, 1830, and costs, \$8.36, being wholly unpaid, he, the said John Snevily, well knowing the same, and in consideration of the said debt and his being discharged from arrest as aforesaid by the said plaintiffs, undertook and promised to pay to the said Alexander Read, surviving James Gray, who had deceased, the said sum or debt of \$285.82, with lawful interest on the same from the said March 15th, 1830, and the said costs when he should be thereto required—nevertheless, the said John Snevily, though often required, the said debts and cost unto him the said Alexander, hath not paid nor any part thereof, but the promise and undertaking of him, the said John Snevily, so as aforesaid made, wholly disregarding, he, the said John Snevily, to pay the said debt and costs to him, the said Alexander Read, surviving the said James Gray, deceased, hitherto hath refused, and still doth refuse, to the dam-

age of the said Alexander Read, \$600, and therefore he brings suits," etc.

The plaintiff gave in evidence the record of the original judgment against the defendant, the *capias ad satisfaciendum*, and the return of the sheriff "discharged by S. Shoch, attorney for plaintiff," and then offered the following deposition of Samuel Shoch, Esq.

"In pursuance of the annexed rule to take deposition on the part of the plaintiff, personally appeared before me, Thomas Lloyd, Esq., a justice of the peace in and for the county of Lancaster, Pa., aforesaid, at my office in Columbia, Lancaster County aforesaid, on Thursday, November 21st, 1839, Samuel Shoch, who being by me first duly sworn according to law, deposed and said, that some time before June, 1832, but how long before he cannot exactly recollect, he was employed by the firm of Read & Gray, of Philadelphia, consisting of Alexander Read and James Gray, to collect a debt due the firm by John Snevily, the defendant in the above stated case, on a judgment note for \$285.82, which had been entered on the records of the Court of Common Pleas of Schuylkill County, to March Term, 1830, No. 62, and also on the records of the Court of Common Pleas of Dauphin County, to April Term, 1830, No. 77, before he was so employed. That a *testatum fieri facias* and *capias ad satisfaciendum* was issued to Dauphin County from Schuylkill County, to July Term, 1832, which was delivered to Jacob Seiler, Esq., sheriff of Dauphin County. That John Snevily repeatedly promised to deponent that he would pay the debt, interest, and costs due on the said execution and judgment. That on June 27th, 1832, Sheriff Seiler and John Snevily aforesaid came to the office of deponent in Harrisburg, and the said Snevily fraudulently and falsely represented that he would have funds in the Harrisburg bank on the following day, and that he would give deponent a check on the said bank for \$150, which, if paid, should be a credit to that amount on the judgment of Read & Gray against him; that deponent accepted the check on those terms, and gave defendant a conditional receipt in accordance. That on the day following deponent presented the check at the said bank during banking hours, and received for answer that John Snevily had no funds there, and there were no funds there to meet and pay the check; that Snevily on that day or a day or two after absconded from Harrisburg, and was absent several months; that this deponent has never received a single cent in payment or on account of the said debt or judgment, nor has the plaintiff been satisfied or paid in any way or manner, so far as this deponent is informed,

nor has deponent nor plaintiffs ever received a cent on the said check ; that the above claim still remaining in this deponent's hands, for collection, he (the deponent) had frequent negotiations with the defendant Snevily, relative to the payment of the said debt, in all of which he always admitted his indebtedness, and frequently during the years 1836, 1837, and 1838 he promised to pay this deponent or the plaintiffs the whole amount due, but has never paid anything. That some time in the winter of 1836 or 1837 deponent met John Snevily in Philadelphia, and spoke to him about this debt, when Snevily told this deponent that he (Snevily) was endeavoring to compromise with his creditors in Philadelphia, and that he believed he would succeed, but that he would not ask a compromise of the debt due by him to Read & Gray, for that he intended to pay them in full, and which payment he would make in a short time. James Gray, one of the plaintiffs in the judgment note on which the execution issued, is dead, having died before the bringing of this suit. The deponent has no interest in this suit of any kind either as attorney or otherwise, having given up to James M'Cormick, Esq., the whole business before this suit was brought, and this deponent never had any interest as attorney either beyond the expectation of a fair compensation for his professional services, about which he had no agreement or understanding with his clients. In all these promises of payment by the defendant John Snevily to the plaintiff of the amount of debt due by him (Snevily) there has been no condition annexed, but they were always unqualified and absolute."

Sworn and subscribed before me at my office, this November 21st, 1839, at 8 o'clock in the evening, no person appearing or attending to cross-examine the witness. Thomas Lloyd, Justice of the Peace.

Defendant objected to this deposition for the following reasons :

1. That plaintiffs are not entitled to recover.
2. The deposition is not admissible under the rule of court, and sworn to after made.

Objections overruled and defendant excepted.

The Court were requested to charge the jury on the following points :

1. The plaintiff's declaration contains no sufficient consideration in law to support the promise and undertaking laid, and therefore the plaintiff cannot recover in this suit.
2. The arrest and discharge of defendant on the execution as set out in plaintiff's declaration, was a full satisfaction and discharge of the debt then existing and now claimed in this suit.

3. The arrest and discharge of defendant as stated amounted to payment and discharge of the debt, and any subsequent promise to pay said debt was *nudum pactum* and void.

4. The arrest and discharge of defendant, as set out in plaintiff's narration, was an extinguishment of the debt, and there was no legal or moral obligation binding upon defendant in relation to said debt which would support a promise to pay it.

5. Under the facts and law of this case the plaintiff is not entitled to recover.

The Court thus charged the jury :

" It appears by the evidence that the plaintiff had a judgment against defendant under a *capias ad satisfaciendum* issued, on which the defendant was arrested by the sheriff of this county, etc. When so arrested, he proposed to arrange the matter by giving his check for part (\$150) of the debt, etc., promising to pay the balance, in consideration of which the attorney discharged him from the arrest. That his check was presented to the bank the next day, but there were no funds there to meet it, etc.; that the defendant has repeatedly since promised to pay the amount of the judgment. If you find the facts to be as stated, the plaintiff is entitled to your verdict. The circumstances of the original indebtedness would be a sufficient consideration for the promise to pay, which, if made, you should, in honesty, compel the defendant to comply with, by rendering a verdict for the amount claimed. The plaintiff's remedy under his former judgment is gone, in consequence of the defendant's arrest and discharge, and if the plaintiff could not recover here, he would lose an honest debt due to him, in consequence of having trusted to the defendant's promises, which he has not performed.

" In answer to the point propounded on behalf of the defendant, we say :

" 1. That the plaintiff's declaration does contain a sufficient consideration in law to support the promise and undertaking laid, and if proved, the plaintiff can recover in this suit.

" 2. That the arrest and discharge was a discharge of the judgment and execution, which could not thereafter be further proceeded on, but did not so satisfy the claim of the plaintiff on defendant, but that the latter might bind himself by promise to pay it.

" 3. That the arrest and discharge did discharge the debt so far as the judgment and execution were concerned, but that a subsequent promise to pay it was not *nudum pactum* and void.

" 4. That the arrest and discharge was an extinguishment of the debt so far as regarded any further proceedings upon the

judgment, and that although there was no legal obligation binding on defendant, yet there was a moral obligation which would support a promise to pay the debt to the plaintiff if he made one.

"5. That under the facts and law of the case, if the jury believe the evidence, which appears to be uncontradicted, the Court believe the plaintiff entitled to recover, and that not to permit him to do so would not be consistent with the honesty and justice of the case, and a due regard to the law, which was made to bind parties to the honest performance of the contracts into which they enter."

Errors assigned :

1. The Court erred in overruling the objections to the deposition of Samuel Shoch.

2. In their answer to defendant's points.

Brown for plaintiff in error.

M'Cormick for defendant in error.

The opinion of the Court was delivered by

SERGEANT, J. A promise made or security given to the plaintiff by a defendant who is in custody under a *capias ad satisfaciendum*, in consideration of his discharging such defendant from custody, is binding ; and therefore, if in this case the plaintiff discharged the defendant in consideration of the defendant giving him his check for a portion of the debt, the defendant would be liable in an action to recover the amount of the check. So if the defendant promised to pay the debt, or a portion of it, in consideration of the discharge. But the position laid down by the Court is much broader. It is, that though the arrest and discharge extinguished the debt so far as the judgment and execution were concerned, yet a subsequent promise to pay would not be *nudum pactum*. And again, that there was still a moral obligation which would support a promise. If the plaintiff arrests a defendant on a *capias ad satisfaciendum*, and imprisons him, and then voluntarily discharges him, the law has always considered it as satisfaction of the debt. It is not only an extinguishment of the judgment, but a voluntary release of the means of satisfaction, which, in contemplation of law, are in the hands of the plaintiff, in addition to which it is a release for a price received, not in money, but in the seizure and imprisonment of the defendant. The common law regards personal liberty as of the highest price. Lord Hobart, C.J., cites the aphorism, *corpus humanum non recipit estimationem*. Hob. 59. Hence it has been repeatedly held that the arrest of a debtor on a *capias ad satisfaciendum*, and a subsequent discharge from arrest by the consent of the creditor, ex-

tinguishes the judgment. *Ransom v. Keyes*, 9 Cow. 128. And these cases, as to the discharge of a defendant on execution, proceed on the ground of its being considered that the plaintiff received satisfaction in law by having his debtor once in custody on execution. *Crary v. James*, 6 Johns. 51; *Yates v. Rensselaer*, 5 Johns. 364.

Then what moral obligation is there upon the debtor to pay a debt from which his creditor has voluntarily released him, after receiving what the law deems satisfaction? I am not able to perceive any. It is true that it was held in *Willing v. Peters*, 12 Serg. & Rawle, 182, that if a debtor has been voluntarily released by his creditor, a moral obligation to pay the debt still exists sufficient to support a subsequent promise to pay the debt. That case went a great way considering that writers on moral law lay it down that if a creditor restore the instrument of obligation, or cancel or destroy it with his own free consent, and with the privity of the debtor, it shall be supposed that the debt is forgiven. Puffendorff, B. III., ch. 6, § 16.

The present case, however, goes beyond that; there is satisfaction received, not only in the imprisonment of the person of the defendant, but also in the new security given as a condition or consideration of the release. To that, therefore, we think the plaintiff must look, and that a subsequent promise to pay the judgment is without consideration and void in law. The case is not like the release of a debtor by a bankrupt or insolvent act, or a debt barred by the statute of limitations. These discharges are all by act of law which does no one an injury. But in the present case it is by the voluntary act of the party himself and under circumstances entirely different.

It is true that this kind of satisfaction has in our times less value than it formerly had because, in the changes of society, the facilities of the debtor to procure his discharge from imprisonment have been much extended, and the creditor is now obliged to look for payment rather to the property of his debtor than to his person. Hence our new code has changed the law on the subject, for by § 31 of the Act of June 16th, 1836, relating to executions, if the creditor discharges his debtor from imprisonment on a *capias ad satisfaciendum*, at the request of the debtor, his remedies on the judgment are to remain the same as if such *capias ad satisfaciendum* had not been issued. But the case before us occurred in the year 1832, and must be judged by the law as it then stood.

We therefore think the Court erred in its direction to the jury, that a subsequent promise was binding, and that there remained a moral obligation to pay the debt. The plaintiff's

cause of action is on the check or other engagement in consideration of which the defendant was discharged.¹

Judgment reversed, and a *venire facias de novo* awarded.

DAVID ILSLEY v. JOHN JEWETT AND OTHERS.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS,
NOVEMBER TERM, 1841.

[*Reported in 3 Metcalf 439.*]

THIS was an action of debt on a bond for the liberty of the prison limits, and was submitted to the Court on the following facts agreed by the parties :

In 1814 the plaintiff paid money as surety for John Jewett, one of the defendants, and in 1840 brought a suit against him to recover back the money so paid. Said Jewett, among other defences, relied on the Statute of Limitations. The plaintiff, to meet this part of the defence, proved a part payment by the defendant, in 1839, and by reason thereof recovered judgment against him at November Term, 1840, as stated and shown in the report of the case of *Ilsley v. Jewett*, 2 Met. 168, which is to be considered as part of this case. Said judgment was for the sum of \$349.89 damages, and \$44.95 costs of suit, and the plaintiff took out execution thereon, and caused the defendant to be committed, on said execution, to the jail in Ipswich. Said defendant, and his co-defendants in this suit, as his sureties, thereupon gave bond for the liberty of the prison limits, conditioned (as is required by the Rev. Stat. ch. 97, § 63), that he would not go without the exterior limits of the prison until he should be lawfully discharged, etc. But after the giving of said bond, and before the commencement of this suit, and also before he was discharged, he went, several times without the boundaries of the town of Ipswich.

Defendants to be defaulted, if such going without the boundaries of the town of Ipswich was a breach of the condition of said bond ; if not, the plaintiff to become nonsuit.

O. P. Lord for the plaintiff.

Perkins (Ward was with him) for the defendants.

SHAW, C.J. In debt on a prison bond given July 14th, 1841, the question is whether the bond was broken by the escape of the prisoner ; and this again depends upon the question, What

¹ A portion of the opinion has been omitted.—ED.

were the prison limits of Ipswich jail, for this prisoner, in 1841? This depends upon Rev. Stat., ch. 14, §§ 13, 14, prescribing different limits in different cases. "On executions issuing upon judgments, recovered upon contracts made before April 2d, 1834, the limits of each jail shall remain as the same were established previously to that day." § 14. It is conceded that prior to 1834 the jail limits included a space much less than the bounds of the town of Ipswich. If then the contract, on which the plaintiff recovered his former judgment, in pursuance of which the defendant was committed, was made prior to April 2d, 1834, so that the limits for him were those which existed in 1834, then the defendant made an escape, and the bond was forfeited.

It appears that Adams and Ilsley were sureties for John Jewett on a promissory note; that Adams paid the whole in the first instance; that afterward Adams demanded of the plaintiff one half, by way of contribution, as he had a right to do, and the plaintiff paid the same, as he was bound to do. On that payment the defendant, John Jewett, as principal promisor, became indebted to the plaintiff, and liable to pay him the same amount on demand. This liability arose from the implied promise of the principal, made at the time of the plaintiff's becoming his surety, that, in case the plaintiff should be called on to pay anything in consequence of such suretyship, the principal would repay the same on demand. (See *Appleton v. Bascom*, ante 171.)

Afterward, in 1839, the transaction took place, as stated in 2 Met. 168, which was held by the Court sufficient evidence of part payment to take the case out of the Statute of Limitations, and the plaintiff had judgment; and the question is whether this is a judgment recovered on a contract made before April, 1834. The case has been very well argued on both sides, and all the authorities, we believe, fully cited. The Court are of opinion that the judgment must be considered as rendered on the old contract; that a payment, or new promise, or an admission from which a new promise may be inferred, is considered as removing out of the way a bar arising from the Statute of Limitations, so as to enable the creditor to recover notwithstanding the limitation; and not as the creation of a new substantive contract, which is to be the basis of the judgment. We are therefore of opinion that the facts show a breach of this bond, and that the plaintiff is entitled to recover.

Defendants defaulted.

CAROLINE BEAUMONT v. HENRY REEVE.

IN THE QUEEN'S BENCH, JANUARY 21, 1846.

[*Reported in 8 Queen's Bench Reports 483.*]

ASSUMPSIT. The first count of the declaration alleged that, whereas, before the making of the promise of defendant after mentioned, defendant had seduced and debauched plaintiff, and had induced and procured her to cohabit with him as his mistress for a long time, to wit, five years, and plaintiff, by reason of the premises, had been and was greatly injured in her character and reputation, and prejudiced in and deprived of the means of procuring an honest livelihood, and otherwise damaged; and whereas, before and at the time of making the promise, etc., plaintiff had ceased to cohabit with, and then lived apart and separate from, defendant; and thereupon heretofore, to wit, on, etc., it was agreed between plaintiff and defendant that they should continue to live apart from each other, and that no immoral intercourse or connection should ever again take place between them; and defendant, as a compensation for the injury so sustained by plaintiff, and in consideration of the premises, then undertook and promised plaintiff to allow and pay her yearly, from the said day, etc., during her life, toward and for her support and maintenance, an annuity of £60; that, although plaintiff and defendant did not, at any time after the making of the promise of defendant, reside or cohabit together; yet defendant, disregarding, etc., hath not allowed or paid the annuity, etc., although often requested; and a large, etc., to wit, £60 of the annuity, for one year, ending upon, etc., now is due, etc. Special demurrer, assigning for cause the grounds insisted on in the argument. Joinder.

Crompton for the defendant.

Banks, contra.

LORD DENMAN, C.J. I think *Binnington v. Wallis*,¹ connecting it with the dictum of Parke, B., in *Jennings v. Brown*,² directly in point. The moral consideration, which alone appears here, cannot support an *assumpsit*. That principle has been lately acted upon by this Court in *Eastwood v. Kenyon*,³ where we adopted the doctrine laid down in the note to *Wenall v. Adney*.⁴ The result is that an express promise cannot be supported by a consideration from which the law could not

¹ 4 B. & Ald. 650.

² 9 M. & W. 496.

³ 11 A. & E. 438.

⁴ 3 B. & P. 249, note *a*.

imply a promise, except where the express promise does away with a legal suspension or bar of a right of action which, but for such suspension or bar, would be valid. This result we arrived at after much deliberation, and we now adhere to it.

PATTESON, J. This declaration appears to be framed on a view suggested by some expressions in *Binnington v. Wallis*¹ which point to a distinction between that case and cases where the defendant is the seducer of the plaintiff. But looking at *Eastwood v. Kenyon*² and *Jennings v. Brown*,³ it is clear that that circumstance is of no consequence as to the legal right. The seduction could give the plaintiff no direct right of action, and can therefore create no liability of any kind from which a consideration can arise.

COLERIDGE, J. *Eastwood v. Kenyon*,⁴ which affirmed the doctrine in the note to *Wennall v. Adney*,⁵ has established the principle that a moral consideration will not support an *assumpsit*; there are certainly some apparent exceptions; but here we have only to act upon the general rule. In *Binnington v. Wallis*⁶ the Court did indeed suggest that the previous fact of the seduction might make a distinction, but that clearly is not so. The circumstance of previous seduction adds nothing but an executed consideration resting on moral grounds only.

WIGHTMAN, J. I felt some doubt in this case, but on considering the point I agree that a precedent moral obligation, not capable of creating an original cause of action, will not support an express promise. And clearly on the authorities there is nothing here to raise any obligation beyond that. We therefore must act on the doctrine laid down in the note to *Wennall v. Adney*.⁷

Judgment for defendant.

JOSEPH VALENTINE *v.* JAMES FOSTER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS,
OCTOBER TERM, 1849.

[*Reported in 1 Metcalf 520.*]

INDEBITATUS ASSUMPSIT for money paid, etc. The report of the Chief Justice, before whom the case was tried, was in substance this: The plaintiff was formerly owner of three eighths of a vessel in his own right, and held two eighths thereof in his

¹ 4 B. & Ald. 650.

² 11 A. & E. 438.

³ 9 M. & W. 496.

⁴ 11 A. & E. 438.

⁵ 3 B. & P. 249, note *a*.

⁶ 4 B. & Ald. 650.

⁷ 3 B. & P. 249, note *a*.

name as trustee for the defendant. An action was brought against the plaintiff and others, as owners of the vessel, for a demand alleged to be due to one Vinal. In the trial of that action the plaintiff called the defendant as a witness, who was objected to on the ground of interest; whereupon the plaintiff executed and delivered to him a release from all liability to contribution for any sum which might be recovered in that suit, and the defendant gave his testimony. Vinal recovered judgment in that suit at the March Term of this Court in Suffolk, 1836, and the present action was brought to recover a part of the amount paid by the plaintiff in satisfaction of that judgment.

To maintain the action, the plaintiff offered to prove that after the trial of Vinal's said action, it appearing that the defendant's testimony was of little importance, the plaintiff proposed to the defendant to give him back the release and take no advantage of it; and that the defendant, in reply, said it would make no difference, he would take no advantage of it.

It was admitted that the plaintiff had no other ground to avoid the release, but a subsequent parol promise without any new consideration.

A nonsuit was entered subject to the opinion of the whole Court.

H. H. Fuller for the plaintiff.

SHAW, C.J. The single question in this case is whether a pre-existing liability to contribution, voluntarily released, by the party to whom it is due, to the party liable, in order to qualify him as a witness in a trial at law, between the releasor and a third party, is a good consideration for a subsequent promise to pay such contribution.

This action is one of new impression, and attempts to carry the doctrine of legal liability, arising upon an express promise made in consideration of moral obligation somewhat further than it has yet been carried.

It is difficult to reduce this principle to a rule sufficiently accurate for practical use, on account of the looseness and uncertainty attending the notion of moral obligation or moral duty.

In *Mills v. Wyman*, 3 Pick. 207, where the subject was largely discussed, it was attempted to restrain and limit the generality of the principle broadly laid down that a moral obligation is a sufficient consideration for an express promise, by confining it to cases where there has been some pre-existing legal obligation, which has become inoperative by force of positive law; and the cases of debts barred by the Statute of Limitations, by a discharge under bankrupt and insolvent laws, and debts in-

curred by infants are put by way of illustration. But it is difficult to reconcile all the cases on the subject upon this principle. *Lee v. Muggeridge*, 5 Taunt. 36.

In some other cases another distinction has been somewhat relied on, to wit, when there is or would be a legal obligation, but where the remedy is taken away by positive law, or where the obligor is exempted from legal liability on considerations of policy. The only case I have found where an action has been held to lie upon an express promise to pay a debt, which had been voluntarily released, is that of *Willing v. Peters*, 12 S. & R. 177. It was a case where the debtor, having become insolvent, made an assignment for the benefit of all his creditors, containing a clause of release on the part of the creditors in consideration of the assignment. A dividend had been received by the plaintiff, the creditor, after which the debtor made an express promise to pay the balance of the debt when he should become able. There, although it was argued that the release was voluntarily made, and though it actually extinguished the whole debt by an instrument under seal which imported a consideration, yet the analogy was so strong to the case of a discharge under a bankrupt or insolvent law, in which it had always been held, that an action might be maintained on an express promise to pay the balance of the debt that the Court decided in favor of the plaintiff.

But we think there are several considerations which distinguish the present case from that cited.

We are then to consider that in becoming party to an assignment made by an insolvent debtor the release is executed at the request and for the benefit of the debtor. And it has an important bearing, in all those cases, that the discharge or exemption, by which the debtor is held not liable to an action, is created for his benefit. Then applying the rule that a party may waive an exception made for his benefit, and that he does waive it by an express promise, it affords a strong legal ground for the maintenance of an action upon such express promise. 21 Amer. Jurist, 278; 3 Bos. & Pul. 249, note. But in case of a release given in Court to qualify a person as witness, the act can in no sense be regarded as done at the request or for the benefit of the releasee. On the contrary, the act is for the benefit of the releasor, that he may have the advantage of the releasee's testimony; and the understanding in all such cases is that he prefers relinquishing forever any actual or contingent claim which he may have upon the releasee, rather than forego the advantage he expects to derive from his testimony.

We also think there is another distinction between the case

at bar and the case cited, founded in obvious and strong considerations of policy. A release given to qualify a witness is usually given in open court, in presence of the jury. It must be full and complete, to the satisfaction of the Court ; it is exhibited and represented as an absolute and complete discharge of all interest in the event of the suit. If it should come to be considered that such a release merely took away a legal remedy, that it left the moral obligation subsisting in its full force, and that the legal obligation would be revived by expressions on which it might be left to a jury to find a promise, it would introduce an element of doubt as to the force and effect of such a release. It might well be argued that it was merely formal, and left the witness still substantially interested, and would have a secret injurious effect upon the credit due to released witnesses.

Without therefore giving an opinion in reference to a case where a creditor has executed a release, to enable an insolvent debtor to obtain his discharge under a general assignment, the Court are of opinion that where a release has been voluntarily executed and delivered by a creditor to his debtor, for the express purpose of discharging all interest, and qualifying him as a witness for his own benefit, there remains no more obligation to pay the debt, which is sufficient to afford a consideration for a new promise upon which an action will lie.

Nonsuit to stand.

FLIGHT v. REED.

IN THE EXCHEQUER, JANUARY 21, 1863.

[*Reported in 1 Hurlstone & Coltman 702.*]

DECLARATION on six bills of exchange, drawn in the years 1855 and 1856, by the plaintiff upon and accepted by the defendant.

Plea. That before the making of the said bills of exchange in the declaration mentioned, or any or either of them, to wit, on October 31st, 1845, A.D., it was corruptly and against the form of the statute in that behalf made and provided, agreed between the plaintiff and defendant, and one Robinson, that the plaintiff should lend and advance to the defendant and the said Robinson a certain sum of money, to wit, £1500, and that the plaintiff should forbear and give day of payment to the defendant and the said Robinson,

until a day then to come, to wit, until the bills of exchange next hereinafter mentioned should become due and payable, and that for such forbearance the defendant and the said

Robinson should pay to the plaintiff more than lawful interest at the rate of £5 per centum per annum, upon the said sums of money so lent and forborne by the plaintiff to the defendant—that is to say, £100. And that for securing the repayment of the said sum of £1500 and interest, the defendant and the said

Robinson should accept and deliver to the plaintiff certain bills of exchange, drawn by the plaintiff upon them, whereby they should engage to pay to the plaintiff or his order £1600, ten weeks after the date thereof and of the said loan. And the defendant further says, that in pursuance of the said unlawful agreement the plaintiff accordingly, to wit, on the day and year aforesaid, made the said loan and advance to the defendant, and the said

Robinson, and they then accordingly accepted bills of exchange, drawn by the plaintiff on them for the sum of £1600, payable as aforesaid. And that save as aforesaid there never was any consideration for the acceptance by the defendant of the said last-mentioned bills of exchange, or any or either of them. And the defendant further says that the said bills were dishonored at maturity, and that the bills of exchange in the declaration mentioned were accepted and given, after the passing of the statute 17 & 18 Vict. ch. 90, by way of renewal of the said other bills of exchange, to secure the payment to the plaintiff of the money secured by the said other bills of exchange so given to the plaintiff as aforesaid, including the said sum of £100 heretofore mentioned, and in the said other bills included as interest as aforesaid; and that save as aforesaid there never was any value or consideration for the acceptance by the defendant of the bills of exchange in the declaration mentioned or any or either of them.

Demurrer and joinder therein.

Lush (*Philbrick* with him) in support of the demurrer.

MacNamara in support of the plea.

The learned judges having differed in opinion, in the ensuing term (May 8th) the following judgments were delivered.

MARTIN, B. This is a demurrer to a plea. The action is upon several bills of exchange. The plea is that before the making of the bills declared on it was corruptly and against the form of the statutes agreed between the plaintiff and the defendant and one Robinson that the plaintiff should lend them £1500, and that he should forbear and give day of payment to them until a future day, and that for such forbearance they should pay to him more than lawful interest at the rate of

£5 per cent per annum upon the sum so lent and forborne, and that for securing the repayment of the said sum of £1500 and interest, the defendant and Robinson should accept and deliver to the plaintiff certain bills of exchange drawn by the plaintiff upon them, whereby they engaged to pay to the plaintiff, or his order, £1600 ten weeks after the date thereof and of the loan. That in pursuance of the said unlawful agreement the plaintiff made the loan, and the defendant and Robinson accepted the bills, and that save as above there was no consideration for these acceptances. That these bills of exchange were dishonored at maturity, and that the bills of exchange declared on were given, after the passing of the statute 17 & 18 Vict. ch. 90, by way of renewal of the said first-mentioned bills, and accepted to secure the payment to the plaintiff of the money secured by the first-named bills so given to the plaintiff and the said usurious interest, and that save as aforesaid there was not any value or consideration for the acceptance by the defendant of the bills sued on.

The plea disclosed this state of things—viz., that when the loan was made and the first bills of exchange given the statute 12 Anne, stat. 2, ch. 16 was in operation, but that when the bills of exchange declared on were given the statute 17 & 18 Vict. ch. 90 had passed. The latter statute repeals the statute of Anne, but the second section provides that nothing in it shall prejudice or affect the rights or remedies, or diminish or alter the liabilities of any person in respect of any act done previous to its passing. The original loan and bills of exchange were therefore left unaffected by it. The statute of Anne enacts that no person upon any contract shall take for a loan of money above £5 per cent for a year, and that all contracts for payment of any principal so lent shall be utterly void, and that any person who shall take above £5 per cent for a year shall forfeit and lose for such offence treble the value of the money lent. The loan was therefore an illegal transaction, and the original contract to repay it, and the bills of exchange given for it were utterly void; and the plea states that save these there was no other consideration for the bills declared on.

It is quite clear that a bill of exchange is a simple contract; it and promissory notes differ from other simple contracts in this, that *prima facie* they import consideration; but when it is proved that there was no consideration, or an illegal one, the bill of exchange or note is of no avail. It does seem superfluous to cite any authority for the above positions, but in my Brother Byles's book upon Bills, page 111 (8th edition), it is stated that the defendant is at liberty in all cases (when the issue raised

admits of it) to show affirmatively, by his own witnesses, absence or failure of consideration ; and again, page 124, the consideration given for a bill must not be illegal ; and at page 132, if part of the consideration of a bill be illegal, the instrument is vitiated altogether ; and at page 288 usury is said to be an indictable misdemeanor at common law, for which Comyns's Digest, title Usury, is cited. Now the consideration for the bills declared on was the usurious loan and the bills of exchange given to secure it. But the statute of Anne has declared these to be utterly void ; and, speaking for myself, I cannot understand how an utterly void and illegal contract or transaction can be a legal consideration for a new contract. But the case does not rest here, for at page 294 the same learned author states that if an usurious bill be in the hands of a holder who was a party to the usurious transaction, and he gives it up for a substituted security, the original usurious taint infects the subsequent security, and either is void. Now applying the above statement of the law, the consequence seems to me inevitable that the bills of exchange sued on are not of avail in the hands of the plaintiff, who was the usurious lender, and that the plea is good.

But a case of *Barnes v. Hedley*, 2 Taunt. 184 was cited. According to the statement in the report, a person called Webb had agreed to lend money at £5 per cent interest, but with a proviso that he should also receive a commission of £5 per cent upon sugars to be bought of him or provided by him, and certain deeds and securities were given to him to secure the balance due. It was admitted at the trial that this was an usurious contract, but it was proved that in consequence of its being intimated to Webb that it was so, it was agreed that Webb should make out fresh accounts, leave out all the usurious charges, charge only for the principal money and legal interest, and that the original deeds and securities in the possession of Webb should be given up and cancelled. Webb accordingly made out such fresh accounts, in which he omitted the usurious charges, and the balance sought to be recovered in the action was composed of the principal moneys actually advanced, with lawful interest fairly and legally calculated, the whole commission and every objectionable charge being omitted. The account was delivered to the debtor, who acknowledged the balance, and promised to pay it, and thereupon the deeds and securities originally given to Webb were produced, and cancelled and burnt in the presence of the debtor. The Court of Common Pleas held that the balance so arrived at and promised to be paid was recoverable at law, and so certified to the Lord

Chancellor, the case being an issue from Chancery. I cannot myself see the application of this case to the present. If it had appeared upon the record that the plaintiff and defendant had accounted together and struck off the usurious interest, and the latter had given the bills declared on for the amount of the original loan and legal interest, it would have been an authority in favor of the plaintiff, but nothing of the kind appears upon the plea; indeed, the contrary appears, for the bills declared on are stated to have been given to secure the payment to the plaintiff of the money secured by the bills of exchange given to him in furtherance of the illegal and corrupt contract, and that there was no other consideration for them. The case has been put thus, that when the bills declared on were given there was no usury law, and it was competent for the defendant to pay or contract to pay interest to any extent, and that the bills were lawful, assuming them to have been given for a loan then made. This is quite true, but it has no application to the real and true case under consideration. There was no loan after the repealing statute was passed. There was no correction of the original unlawful transaction. There is nothing whatever shown on the record except bills given upon and in respect of a transaction which the law had declared to be utterly void, and which at one time seems to have been considered an indictable crime.

Another case was cited, *Wright v. Wheeler*, which will be found in a note to *Barnes v. Hedley*, 1 Camp. 165. This was an action upon a bond. There had been an usurious contract, but afterward the parties agreed that some usurious interest which had been paid should be deducted from the principal, and a bond given for the balance of the principal with lawful interest. Lawrence, J., was of opinion at *nisi prius* that the bond was lawful. The parties, he said, had rectified their error, and substituted for an illegal contract one which was fair and legal. The case has no bearing upon the present. There is here no substitution of a legal contract for an illegal one; it is a mere continuance of the old unlawful contract. *Cuthbert v. Haley*, 8 T. R. 390, is to the same effect.

A case of *Wicks v. Gogerley, R. & Moo.* 123 (E. C. L. R. Vol. XXI.) was also cited by the leading counsel for the plaintiff, but according to the statement of the law laid down there by Best, C.J., the plaintiff is not entitled to recover. He says the principle is that where parties to an usurious agreement "state an account and agree upon the sum which would be due for principal and legal interest, after deducting all that has been paid beyond legal interest, and a fresh promise is made to pay that sum, such promise is free from the original usury, and

is perfectly valid in law. But in order to bring this case within the principle, all beyond legal interest must be repaid or deducted." In the report of *Barnes v. Hedley* in 1st Campbell, which I have before referred to, there is a judgment of Chamber, J., which seems to me to be well worthy of consideration by any one who desires to ascertain what is the true law upon this subject. There is also a case which was not mentioned in the argument, *Preston v. Jackes*, 2 Stark. 237 (E. C. L. R., Vol. III.), which was tried before Holroyd, J., who held that a party could not recover on a note which operated as a security for any usurious interest. This case seems to me in point for the defendant, and any opinion of Holroyd, J., wherever given, is entitled to the greatest weight and is of the highest authority.

The result is that in my opinion an usurious loan within the statute of Anne, and usurious interest contracted to be paid for it, is not a good consideration for a bill of exchange, and that a bill given upon such consideration is not of avail; and this opinion does not contravene the case of *Barnes v. Hedley*, reported in 2 Taunton, or any other case or authority which I have met with or has been referred to; but, on the contrary, in my opinion, is in conformity with them all.

POLLOCK, C.B. The judgment which I am about to deliver is that of my Brother Wilde and myself.

My Brother Martin having stated the pleadings, it is not necessary to repeat them.

The real question raised by this demurrer is whether there is a good consideration for the bills declared upon.

The original bills were given for an advance of money with usurious interest at a time when such a transaction was forbidden by law, and were therefore void and of no legal obligation.

The bills sued on were given since the repeal of the usury law, and at a time when the giving or confirming an obligation to pay any amount of interest, however high, was perfectly legal and binding.

But the altered law did not render valid the original bills; they were void when given, and remained void and of no legal obligation up to the time when they were renewed by the bills in question.

The original bills, therefore, could not form a legal consideration for those now sued upon. Indeed, there was, when the fresh bills were given, no legal obligation whatever upon the defendant to repay a single farthing of the large advance he had received. But for that advance he has voluntarily given these bills, and whether the law will permit and enforce such a contract is the question.

During the existence of the usury law the courts of law were bound to enforce them, to deal with interest above the statute rate as an unlawful and forbidden thing, and to discover and defeat all attempts, direct or indirect, to give or enforce it.

But the legislature has since repealed the laws against usury, and upon a fuller and wider view of public policy declared the rate of interest on loans to be unlimited and free.

The courts of law are bound with equal fidelity to give effect to this new and opposite view of the legislature. Interest above £5 per cent should no longer be regarded as of necessity illegal or unrighteous, and no facility should be given to escape from an obligation to repay a real advance of money, or evade a contract willingly made, though interest should have been contracted for which used to be at a rate called usurious rate.

We make these remarks, because in argument the expression "taint of an usurious transaction" was often repeated, and the Court was pressed in language, commonly and properly used while the usury laws were in force, to give no countenance to a contract of which the origin was an advance of money with more than £5 per cent interest.

Such remarks have no application to or bearing on a contract made like that in question since the usury laws have been repealed.

We therefore pass them by to consider the true question in the case—viz., whether an advance of money under such circumstances as to create no legal obligation at the time to repay it can constitute a good consideration for an express promise to do so.

Such a consideration has been sometimes called a moral consideration. And we think unfortunately so, for the term used as a definition tends to include too wide a range of objects.

And there are many conjunctures in which a man may feel himself morally bound to pay money and promise to do so, which the law would not recognize as forming a good consideration.

But a loan of money is a very different thing. The very name of a loan imports that it was the understanding and intention of both parties that the money should be repaid.

And though at the time of the advance the law, for reasons of public policy, forbid any liability, and incapacitate the parties from making a binding contract, there is no reason why a binding contract should not be made afterward if the legal prohibition be removed.

And the consideration which would have been sufficient to support the promise, if the law had not forbidden the promise

to be made originally, does not cease to be sufficient when the legal restriction is abrogated.

There is, therefore, reasonable ground, as it seems to us, for this qualified proposition—viz., that a man by express promise may render himself liable to pay back money which he has received as a loan, though some positive rule of law or statute intervened at the time to prevent the transaction from constituting a legal debt.

There is likewise authority for it. The general doctrine within which such a proposition falls is, we believe, first found promulgated in Lord Mansfield's time. It is the subject of a long note to the report of the case of *Wennall v. Adney*, 3 Bos. & P. 249. It has been the subject of much discussion in many subsequent cases. It was stated most widely, and perhaps too widely, in the case of *Lee v. Muggeridge*, 5 Taunt. 45 (E. C. L. R., Vol. I.). And it has consequently been much qualified and sometimes disparaged since. See *Eastwood v. Kenyon*, 11 A. & E. 447 (E. C. L. R., Vol. XXXIX.); *Beaumont v. Reeve*, 8 Q. B. 487 (E. C. L. R., Vol. LV.); *Cocking v. Ward*, 1 C. B. 870 (E. C. L. R., Vol. L.).

But it was repeated and stated to be undoubted law by Parke, B., in *Earle v. Oliver*, 2 Exch. 71, 89, who says: "The strict rule of the common law was, no doubt, departed from by Lord Mansfield in *Hawkes v. Saunders*, Cowp. 290 and *Atkins v. Hill*, Cowp. 284.

"The principle of the rule laid down by Lord Mansfield is, that where the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by law to perform it.

"There is a very able note to the case of *Wennall v. Adney*, 3 Bos. & P. 247 explaining this at length. The instances given to illustrate the principle are, among others, the case of a debt barred by certificate and by the Statute of Limitations, and the rule in these instances has been so constantly followed that there can be no doubt that it is to be considered as the established law."

The case of *Fitzroy v. Gwillim*, 1 T. R. 153 is an example of the view that has been taken of the subject even in a court of law, but although that case is certainly not law, it is quite true that courts of equity have relieved (where their interference was wanting) only on the terms of the principal and legal interest being paid.

We think the view we have taken receives considerable support from the case of *Barnes v. Hedley*, 2 Taunt. 184, which, if not a direct authority for the plaintiff, is somewhat similar in its circumstances ; the usurious interest was in that case struck out, but now, since the repeal of the statute of Anne, there is nothing unlawful in usurious interest. Here the defendant says : " I could not then make the promise ; I can now, and I am willing to do so."

The plaintiff is, therefore, in our opinion, entitled to the judgment of the Court.

Judgment for the plaintiff.

GOULDING v. DAVIDSON.

IN THE COURT OF APPEALS OF NEW YORK, JUNE TERM, 1863.

[*Reported in 26 New York Reports 604.*]

APPEAL from the Supreme Court. Action brought in the year 1857. The complaint showed that the firm of McCreery & Goulding sold and delivered goods to the defendant at different times and at her request, for which she gave them three promissory notes, described in the complaint, for the several sums of \$200, \$374.98, and \$176.78. That such firm, at another time, sold and delivered goods to her and at her request of the value of \$10.50. The complaint contained the following allegations : " And the said plaintiff further shows on information and belief, that the aforesaid promissory notes, and each and every of them were made and delivered to the said McCreery & Goulding for merchandise sold and delivered by the said McCreery & Goulding, to her at her request, and solely on her credit and responsibility, she being then a trader doing business in her own name, and for her own personal benefit and advantage, and holding herself out to be an unmarried woman ; but she nevertheless, as the plaintiff has been informed and believes, alleged that she was, at the time such goods were sold and delivered to her, and all the said contracts in this complaint mentioned entered into, a married woman, and was then intermarried with one Davidson, of which the said McCreery & Goulding were ignorant. But the plaintiff says that after the sale and delivery of the said goods, and after the making of the said notes and all the said contracts named, and on or about September 1st, 1854, her said alleged husband died, and she has not since intermarried ; that after the death of her said alleged husband, and she being then

sole, to wit, in or about the month of September, 1855, she, in consideration of the premises and of her duty in that behalf, and of the moral obligation resting upon her to pay for the said goods and merchandise, and to pay the said promissory notes and expenses aforesaid, undertook and promised to and with the said McCreery & Goulding to pay the same and every part thereof."

The complaint contained allegations showing that the plaintiff had become the sole owner of the several alleged causes of action therein set out, and concluded with a demand of judgment.

The defendant demurred, assigning as the only ground that the complaint did not state facts sufficient to constitute a cause of action.

Judgment was given upon the demurrer in favor of the defendant at the special term, which judgment was affirmed at a general term of the Supreme Court in the first district.

The plaintiff appealed therefrom to this Court.

Andrew Boardman for the appellant.

John H. Reynolds for the respondent.

BALCOM, J. As this action was commenced in 1857, it must be determined by the rules of the common law, irrespective of the alterations made by our recent statutes in the laws affecting husband and wife.

It cannot be said that the husband of the defendant was ever liable *ex contractu* to pay for the goods. They were not necessities, and there is no allegation in the complaint that he knew of the purchase of the goods by his wife, or that they ever came to his possession.

There is another view of the case which shows the promise of the defendant to pay for the goods and pay the notes she gave therefor, was founded upon a sufficient consideration.¹

I am aware the general rule is that a moral obligation is not alone a sufficient legal consideration to support a promise. (1 Story on Cont., 4th ed., §§ 465-469; Chitty on Cont., 9th Am. ed., pp. 48-49; 24 Wend. 97; 1 Hill, 532; 5 Hill, 306.) And the Superior Court of New York City went so far in *Watkins v. Halstead*, 2 Sand. S. C. 311, which case was followed by the Supreme Court in this, as to adopt the language of a note to *Wennall v. Adney*, 3 Bos. & Pul. 252, where it was said that "an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original right of

¹ Only so much of the opinion is given as relates to this question.—Ed.

action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision." But this rule is too broad, or at least there are exceptions to it. For there are cases where a moral obligation that is founded upon an antecedent valuable consideration is sufficient to sustain a promise, though the obligation on which it is founded never could have been enforced at law. In other words, a moral obligation is sometimes a sufficient consideration for an express promise, if at some time or other a good or valuable consideration has existed, although there never was a time prior to such express promise when any portion of the precedent consideration could have been enforced at law or in equity through the medium of any promise. To illustrate. If money be loaned upon usury, and usurious security taken therefor, such security is absolutely void, and no action can be maintained upon it; nor is it evidence of an indebtedness upon the strength of which the law will imply a promise on the part of the borrower to repay the amount actually received by him. The express contract being absolutely void, no implied obligation can spring from it. The lender cannot waive or abandon the usurious agreement so far as it is illegal and enforce it for the residue. The contract is one; no matter what the nature or numbers of the securities may be, all are void. The contract cannot be broken up and resolved into its original parts or elements, so as to get rid of the illegal taint without the consent of both parties. But if it is mutually abandoned, and the securities are cancelled or destroyed, so that they can never be made the foundation of an action, and the borrower subsequently promise to pay the amount actually received by him, such promise is legal and binding. It is founded upon an equitable and moral obligation, which is sufficient to support an express promise. The money actually lent when legally separated from the usurious premium, is a debt in equity and conscience, and ought to be repaid. (Per Sutherland, J., in *Hammond v. Hopping*, 13 Wend. 511-512; *Miller v. Hull*, 4 Denio, 104; *Chitty on Cont.*, 9th Am. ed., 712-713; 1 *Story on Cont.*, 4th ed., § 603; 2 *Pars. on Cont.*, 3d ed., 397; *Parson's Mercantile Law*, 257; *Barnes v. Hedley*, 2 Taunt. 184.)

In *Lee v. Muggeridge*, 5 Taunt. 35, a *feme covert* having an estate settled to her separate use, gave a bond for repayment, by her executors, of money advanced at her request, on security of that bond to her son-in-law; and after her husband's decease she wrote, promising that her executors should settle the bond, and it was held that *assumpsit* would lie against the executors on such promise of the testatrix. That case was not over-

ruled by the decision in *Meyer v. Haworth*, 8 Adol. & Ellis, 467, though it must be conceded it was very much weakened as an authority in England by *Eastwood v. Kenyon*, 11 Adol. & Ellis, 438. And *Littlefield, Executrix, etc., v. Shee*, 2 Barn. & Adol. 811, was put mainly upon the ground that the price of the goods originally constituted a debt from the husband, though Lord Tenterden in deciding it said he must also observe "that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise is one which should be received with some limitation." *Lee v. Muggeridge* has never been overruled in this State. *Smith v. Wane*, 13 Johns. 257, does not do it, for that was a case to recover back money the plaintiff had paid the defendant for land, the former claiming there was a deficiency in the number of acres, and *Spencer, J.*, in delivering the opinion of the Court, said: "It cannot be pretended that the defendant was under any moral obligation to pay for the deficiency in quantity of land sold and conveyed to the plaintiff." All that was decided in *Ehle v. Judson*, 24 Wend. 97, was that a mere moral or conscientious obligation, unconnected with a prior legal or equitable claim, is not a sufficient consideration to support a promise, and *Bronson, J.*, who gave the opinion of the Court, said: "The moral obligation to pay a debt barred by the Statute of Limitations, or an insolvent's discharge, or to pay a debt contracted during infancy or coverture and the like, will be a good consideration for an express promise." In *Wilson v. Burr*, 25 Wend. 386, it was held the plaintiff would recover his claim of \$200 counsel fees, and the Court said: "It is true at the time of the retainer the defendant was a *feme covert*, but she was soon after divorced, and it is to be presumed subsequently recognized the services rendered."

There are some, perhaps many, broad assertions in our reports going to show that the promise of the defendant in this case is not obligatory, and the reasoning tends that way in the following cases: *Geer and Wife v. Archer*, 2 Barb. 420; *Nash v. Russell*, 5 Barb. 556; *Ingraham v. Gilbert*, 20 Barb. 151. But there are equally broad expressions in our reports the other way, and the reasoning in such cases as *Doty v. Wilson*, 14 Johns. 378, and others I might mention, certainly tends to the conclusion that such promise is binding, as in justice it clearly ought to be.

The goods were sold and delivered by the vendors with the expectation on their part that they would receive pay for the same, and upon the defendant's express promise that she would pay for them, and under such circumstances that the vendors

had no claim therefor against her husband. The goods were valuable and the defendant personally received the benefit of them, and the price she agreed to pay therefor is a debt which, "in equity and conscience," she ought to pay. In other words, she ought in common honesty to pay for the goods. Her promise so to do was made for value actually received by her personally, and it was to discharge a moral obligation founded upon an antecedent valuable consideration, created for her own personal benefit, and at her special instance and request, and I am of the opinion the law makes such promise obligatory upon her.

It seems to me that the defendant's moral obligation to pay this debt is so interwoven with equities as to furnish a good consideration both upon principle and authority for her promise to pay it. I will add that the fact is controlling with me, that the defendant personally received a valuable consideration for the money she has promised to pay, and this distinguishes the case from some that seem to weigh against the conclusion that the defendant's promise is valid.

It is unnecessary to notice any of the recent changes made by the Legislature in the law affecting husband and wife, as they are all inapplicable to the case, which must be determined as the law was when the alleged cause of action accrued.

For the foregoing reasons I am of the opinion the complaint states facts sufficient to constitute a cause of action, and that the judgment of the Supreme Court should be reversed, and judgment given for the plaintiff on the demurrer with costs, but with liberty to the defendant to apply to the Supreme Court for leave to answer on terms.

DAVIES, J. A natural or moral obligation is one which cannot be enforced by action, but which is binding on the party who incurs it in conscience and according to natural justice. (2 Bouv. 200.) And the instance of such an obligation is given, as when the action upon the contract is barred by the Statute of Limitations, a natural or moral obligation still subsists, although the civil obligation is extinguished. A natural obligation is a sufficient consideration for a new promise. (5 Binn. 33; 2 Binn. 591; Yelv. 41, a. n. 1; Cow. 289; 2 Bl. Com. 445; 3 B. & P. 249, n.; 2 East, 506; 3 Taunt. 311; 5 Taunt. 36; Yelv. 41, 6 n.; 3 Pick. 207, and other cases hereinafter referred to.)

The very able note to Wennall *v.* Adney, 3 Bos. & P. 249, contains a review of all the cases and a criticism upon the decision of Lord Mansfield, and the writer says that the instances adduced by him as illustrative of the rule of law, do not carry that rule beyond what the older authorities seem to recognize

as its proper limits, for in each instance the party bound by the promise had received a benefit previous to the promise. Indeed, it is said, it seems that in such instances alone will an express promise have any operation, and there it only becomes necessary because though the consideration was originally beneficial to the party promising, yet inasmuch as he was not of a capacity to bind himself when he received the benefit, or is protected from liability by some statute provision or some stubborn rule of law, the law will not as in ordinary cases imply an *assumpsit* against him. Again, it is remarked that Lord Mansfield appears to have used the term moral obligation, not as expressive of any vague and undefined claim arising from nearness of relationship, but of those imperative duties which would be enforceable by law, were it not for some positive rule, which with a view to general benefit exempts the party in that particular instance from legal liability. Were it not for the legal disability in the party making the contract at the time it was so made, the law would imply a promise. But by reason of such disability the contract cannot be enforced unless there be an express promise to fulfil after the disability ceases. And the moral obligation thus to perform the contract made under disability has been held to be a good consideration to support the express promise. Thus Bronson, J., said, in *Ehle v. Judson*, 24 Wend. 97, that the moral obligation to pay a debt barred by the Statute of Limitations or an insolvent discharge, or to pay a debt contracted during infancy or coverture, and the like, will be a good consideration for an express promise. But a merely moral or conscientious obligation unconnected with any prior legal or equitable claims is not enough. The doctrine thus laid down and stated with great precision and accuracy is fully sustained by the authorities. Buller, J., in *Hawkes v. Saunders*, Cowp. 289, says the point is whether an obligation in justice, equity, and good conscience to pay a sum of money be or be not a sufficient consideration in point of law to support a promise to pay that sum. If such a question, he says, were stripped of all authority, it would be resolved by inquiring whether law were a rule of justice, or whether it were something that acts in direct contradiction to justice, conscience, and equity. He says the matter has been repeatedly decided and refers to numerous authorities.

In *Barnes v. Hedley*, 2 Taunt, 184, a promise to pay a void and usurious debt was held binding on the party making it, and although the promisor was not and never had been under any legal obligation to pay the debt, yet it was held that in conscience and equity he was bound to pay the money actually bor-

rowed, and that such moral obligation formed a good consideration for a promise to pay it.

Lee v. Muggeridge, 5 Taunt. 35, is a case often referred to, and was regarded as a controlling authority until a late period, when its soundness has been in some degree questioned. There a *feme covert*, having a separate estate, gave a bond for the repayment by her executors of a certain sum of money advanced at her request on the security of that bond to her son-in-law. After her husband's decease she wrote promising that her executors should settle the bond. It was held that *assumpsit* would lie against the executors upon the promise of their testatrix. Mansfield, C.J., said that it had long been established that where a person is bound morally and conscientiously to pay a debt, though not legally bound, a subsequent promise to pay will give a right of action. And the judges say that the case is not distinguishable from *Barnes v. Hedley*, *supra*, that in that case certainly Hedley was never for a moment legally bound to pay a farthing of that money for which he was sued. *Bentley v. Morse*, 14 Johns. 468, is a case similar in principle to *Hedley v. Barnes*. In that case a debt had been paid and a receipt taken therefor as evidence of the payment. A suit was brought to recover the same debt, and the receipt not being produced a recovery was had and the amount paid the second time. There was, therefore, no legal liability on the part of the creditor to refund the money, but a moral and conscientious obligation to do so, as he had no claim morally to the money paid the second time. It was held that a promise to repay on production of the receipt was founded on a good consideration.

The Court says: "The debt having been paid, the recovery in the former action was clearly unjust. And though in consequence of his neglect the defendant in error lost all legal remedy to recover back his money, yet there was such a moral obligation on the part of the plaintiff in error to refund the money, as would be a good consideration to support an *assumpsit* or express promise to pay it. The moral obligation is as strong as any in the cases in which it has been held sufficient to revive a debt barred by statute or some positive rule of law. It is like the promise of an infant to pay a debt contracted during his non-age, or of an insolvent or bankrupt to pay a debt from which he is discharged by his certificate. *Littlefield v. Shee*, 2 Barn. & Ad. 811, was decided in 1831, and on the ground that in that case the debt which the wife promised to pay after she became discovert, was the debt of her husband, and that she was under no moral obligation to pay the same. Butcher's meat had been furnished to the wife for the space of about six

months, while her husband was absent abroad, and after his death she promised to pay it. Lord Tenterden held that the plaintiff had failed to show that he had supplied the defendant with the meat, but that it appeared it was furnished to her while her husband was living, so that the price constituted a debt due from him. They were, therefore, of the opinion that the declaration was not supported by the proof, and the nonsuit was right. *Lee v. Muggeridge* is referred to, and it is remarked that all the circumstances in that case showed that the money was in conscience due from the defendant. In *Eastwood v. Kenyon*, 11 Adol. & Ellis, 438, the broad doctrine assumed to be laid down in *Lee v. Muggeridge* is criticised by Lord Denman, and it is said that that doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it. And he quotes with approbation the note to *Wennall v. Adney*, *supra*, "that an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise had it not been suspended by some positive rule of law, but can give no original cause of action, if the obligation on which it is founded never could have been so enforced at law, though not barred by any legal maxim or statute provision. And he thought the case of *Barnes v. Hedley* was fully consistent with the doctrine of this note. *Watkins v. Halstead*, 2 Sand. S. C., was a case of goods sold under such circumstances that the husband was clearly liable for them, and that no moral obligation rested upon the wife to pay for them. The promise after she was divorced from her husband to pay for them was but a promise to pay the debt of another person, and the Court held, following *Littlefield v. Shee*, that there was no good consideration to support the promise. I should judge from the statement of the case that the goods were originally charged to the husband and sold on his credit, with the understanding that if he did not pay for them the wife would.

Geer and Wife v. Archer, 2 Barb. S. C. 420, was a case when it was held that a mere moral or conscientious obligation, unconnected with a prior legal or equitable claim, is not sufficient to support an express promise, and the rule as laid down in the note in *Bos. & Pull.*, *supra*, is cited as containing the true test.

In the present case can there be any doubt but that the defendant, if she had been a single woman, would have been under both legal and equitable obligation to pay for these goods? The law would have raised, in that event, an implied promise to pay for them; an express promise therefore revived a prece-

dent good consideration, which might have been enforced at law through the medium of an implied promise. The inability of the wife to contract is precisely the same as that of an infant, and cannot be distinguished from it. If a sale and delivery of goods to an infant imposed a moral obligation upon him to pay for them, it is not perceived why a sale and delivery of goods to a married woman, as in the present case, solely on her credit and responsibility, she being a trader, doing business in her own name, and for her own personal benefit and advantage, and holding herself out as an unmarried woman, does not impose upon her the same moral obligation to pay for them. This case is distinguishable therefore from those of *Littlefield v. Shee* and *Watkins v. Halstead* in that the debt in the present case was never that of the husband. The wife here was a sole and separate trader on her own account and for her own personal advantage, and not by permission of the husband. He was not therefore liable for the debts contracted by her, neither would the property so purchased by her be liable to the payment of his debts. (*Sherman v. Elder*, decided at March Term, 1862, 24 N. Y. 381; 2 Bright. on Husband and Wife, p. 300; *Smith v. Silliman*, 11 How. Pr. 368.) This is not in conflict with the case of *Lovett v. Robinson*, 7 How. Pr. 105, as that case was put on the ground that the wife was living and cohabiting with the husband, and it was held there that the goods then purchased by her became those of her husband, and the title thereto was vested in him.

It follows from these views that the debt referred to in the complaint, under the circumstances therein detailed, was not the debt of the defendant's husband, but that morally and equitably she ought to pay the same. That but for the rule of law prohibiting a *feme covert* from entering into or making a legal contract, the law would have implied a promise on her part to pay for the same, and that after such disability ceased, she having made an express promise to pay the price of such goods, the moral obligation or duty resting on her to make such payment, formed a good consideration for such promise, and she is consequently liable to pay for the same. The judgment of the Supreme Court should therefore be reversed, and judgment should be given for the plaintiff on the demurrer with costs.

EMOTT, J. The action of the plaintiff must, of course, rest upon the express promise of the defendant made after her coverture ended to pay the debts or the notes which represent them. The question is whether the previous sale and delivery of the goods to the defendant during coverture was a sufficient

consideration to sustain the promise. The authorities upon the subject of a promise by a married woman after coverture to pay a debt incurred or an obligation given by her during coverture are not uniform either in their reasoning or their conclusions. One of the earliest cases is *Lloyd v. Lee*, 1 Strange, 94, where a married woman gave a note as a *feme sole*, and after her husband's death promised to pay it. It was held that the note was void, and forbearance to sue it constituted no consideration for a promise to pay it. It will be observed that there is nothing in this case to show what was the original consideration of the note. On the other hand, in *Lee v. Muggeridge*, 5 Taunt. 35, a married woman gave a bond, while married, to a person for money advanced by him to her son-in-law at her request. After her husband's death she promised to pay that bond, and *assumpsit* was sustained upon that promise. The language of Lord Mansfield, and of all the other judges of the Court of Common Pleas, was very strong in this case to the sufficiency of a mere moral obligation as a consideration for a subsequent promise. But this language has been questioned, and the authority of the decision weakened by the later English authorities. Thus in *Littlefield v. Shee*, 2 B. & A. 811, Lord Tenterden, delivering the judgment of the Court of King's Bench, held that a promise by a married woman to pay for goods which had been previously supplied to her during coverture was void, because the goods were in law supplied to her husband, and the price was a debt from him, not her. Lord Tenterden observed in his judgment that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise, is one that should be taken with some limitation. Again in *Meyer v. Haworth*, 8 A. & E. 467, Lord Denman and all the other judges of the King's Bench adhered to this doctrine upon demurrer in a similar case. The Lord Chief Justice said: "The record states that goods were supplied to a married woman who, after her husband's death, promised to pay. This is not sufficient. The debt was never owing from her." The cases were again adverted to, and the law upon the subject of a moral obligation as a consideration for a promise discussed at some length by Lord Denman, in *Eastwood v. Kenyon*, 11 A. & E. 438. The action there was against the husband of a woman who had inherited lands. The plaintiff had voluntarily expended money in the improvement of the lands while she was sole and an infant. After she came of age she assented to it and promised to pay the account, and after marriage the defendant assented to the account and promised to repay the plaintiff, and the suit was brought on this express promise. It was held that the

consideration shown was past and executed, and not at the request of the defendant or of his wife, and therefore was a mere voluntary courtesy and would not sustain the action. The case of *Lec v. Muggeridge* was again questioned in this judgment. In our own courts there are *dicta* in many cases to the effect that the moral obligation to pay a debt contracted during coverture will be a sufficient consideration for an express promise after the disability is removed. (24 Wend. 99 ; 25 Wend. 386-388.) The question, however, was never distinctly presented, as far as I am aware, until the case of *Watkins v. Halstead*, 2 Sand. S. C. 311, where it was determined by the Superior Court of New York adversely to the doctrine advanced by the plaintiff. The decision is approved by Parsons, in his work on Contracts, Vol. I., pp. 358-361, and was followed by the Court below in this case.

There is a distinction taken in some of the cases between obligations which are void and such as are only voidable, and it is said that where the original undertaking was void, it cannot form the basis or consideration for a new promise, although it may where it is only voidable. Thus in *Meyer v. Haworth*, 8 A. & E. 467. Patterson, J., says, speaking of a supposed promise of the defendant while a married woman upon the sale of the goods : "Such promise was not like that of an infant voidable, but was void." This distinction, however, applied to the original express contract alone, when there is one, will not explain all the cases. Thus, where money is lent upon an usurious contract which is totally void, yet, if the borrower subsequently promise to repay the money, that promise will be enforced by the courts. (2 Taunt. 182 ; 19 John. 147.) On the other hand, where a creditor obtained from the debtor a promissory note for the residue of his demand, as a condition of his joining with the other creditors in a composition deed acknowledging satisfaction by the receipt of a part of their debts, the note is void in law as a fraud upon the other creditors, and a subsequent promise to pay it was held without consideration. (2 T. R. 763.)

Where the original contract or promise is in itself the whole consideration upon which the new promise rests, the distinction which has now been adverted to is sufficient to dispose of the case. If that contract was wholly void, it alone will not sustain a subsequent promise to fulfil it. Thus in *Lloyd v. Lee*, 1 Strange, 94, already quoted, the new promise of the defendant rested entirely upon her having given a note during coverture. This note was void, and as there was no proof of any other consideration, either for the note or the new promise, the action

was not sustained. But where there is, beyond or before the void security or agreement, a moral obligation or duty arising from benefit received or otherwise, which would raise an implied promise, except for a disability to make a promise which the law imposes ; a promise made after the disability is removed can rest upon this benefit and duty as a sufficient consideration. The learned note to *Wennall v. Adney*, 3 B. & P. 247-252, which has been cited and approved by the judges in subsequent cases, requires some qualification or explanation, where it states that "if a contract between two persons be void, and not merely voidable, no subsequent express promise will operate to charge the party promising, even though he has received a benefit from the contract." This remark is strictly true as to a promise founded upon the contract alone, but the case of usurious loans, which the borrower will be held to pay upon a subsequent promise, shows that when, behind the void contract there is a sufficient consideration, it will sustain the subsequent promise. The rule stated in the residue of the note needs no qualification, and has often received express judicial approval. "An express promise can only revive a precedent good consideration which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action if the obligation on which it is founded could never have been enforced at law, though not barred by any legal maxim or statute provision." The receipt of money, or of any benefit or advantage, from the promisee, at the request of the promisor, will sustain a promise to repay it, although the money was advanced or the benefit received under a void contract, provided that the consideration for that contract itself was not tarnished with fraud or otherwise invalid. So when the promisor was, at the time of the receipt of the benefit, under a mere disability to contract to make it good, arising from a rule or maxim of law, and although such a contract could neither be expressed nor implied at the time, yet a subsequent promise, after the disability is removed, will rest upon the original benefit, passing over any invalid contract or promise at the time.

But this rule would not help the case of a subsequent promise to pay for goods sold or delivered to the promisor while a married woman at common law. The difficulty in such a case was that which was seen in the two cases in the Court of King's Bench to which I have referred. (2 B. & A. 811 ; 8 A. & E. 467.) In such cases at common law the goods were, in law, supplied to the husband, and the price was a debt owing from him and never from her. If, therefore, she gave a note or other

express obligation, it was not only void, but had no consideration. Even if her disability to contract were removed, or did not exist, yet, as long as the rules of the common law as to marital rights remained unchanged, there was nothing from which the law could imply a promise to pay, because the goods supplied to her became her husband's, and she acquired no beneficial interest in them. The law might imply a promise on his part to pay for them, but not on hers. For this reason I agree that, at common law, a promise by a woman, after coverture, to pay for goods supplied to her, or at her request, while married, could not be sustained.

But the statutes of this State, passed in 1848 and 1849, in respect to the rights of married women, give a different aspect to such a question. (Laws of 1848, p. 308 ; Laws of 1849, p. 528.) Since these statutes any married female may take from any person other than her husband, and convey, personal property, and it will not be subject to the disposal or to the debts of her husband. It is true that these statutes did not remove the disability of married women to make executory contracts, so that any note or obligation which a married woman should make upon the purchase or acquisition of property would be void. It is true also that the same disability prevented the implication of any contract on her part to pay for such property. But personal property, sold or conveyed in any manner to a married woman in good faith, since the statute, by any person other than her husband is hers and not his. It becomes her sole and separate property, and he is neither entitled to it nor bound to pay for it. For this reason no debt or engagement is implied on his part in consequence of its acquisition. On the other hand, such acquisition is directly beneficial to the married woman ; it becomes hers and not her husband's, and if it were not that the law disabled her, a promise to pay for it would at once be implied by the law from the fact of its acquisition.

The transactions stated in the complaint in the present case occurred in 1852, after those statutes. They are to be taken to be actual and *bonâ fide* sales and transfers of property to the defendant, who was then a married woman. She became, by these transfers, the owner of these goods, and although she was incapable of any agreement, express or implied, to pay for them, yet that was merely on account of the existence of a legal rule or maxim. The delivery of the goods to her, at her request, under the statute which made them hers, and not her husband's, was a good consideration, out of which an implied promise would at once have arisen had it not been suspended by the rule of law as to her disability to make an executory

agreement. When that disability was removed it furnished a sufficient consideration for her express promise upon which these actions were founded. The case comes precisely within the rule of the note to Wennall v. Adney, and it is relieved of the difficulty which was fatal to the plaintiff's action in the other cases referred to.

The demurrer should have been overruled in the Court below, and their judgment should be reversed.

DENIO, C.J., SELDEN, ROSEKRANS, MARVIN, and WRIGHT, JJ., concurred. The latter read an opinion in which he only considered the last question discussed in the opinion of BALCOM, J., agreeing with him.

Judgment reversed and rendered for plaintiff on the demurrer.

BENJAMIN G. DUSENBURY, EXECUTOR, ETC., APPELLANT, v. MARK HOYT, RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, OCTOBER 7, 1873.

[*Reported in 53 New York Reports 521.*]

APPEAL from judgment of the General Term of the Superior Court of the city of New York, affirming a verdict in favor of defendant entered upon a verdict, and affirming order denying motion for a new trial. (Reported below, 45 How. Pr. R. 147.)

The action was upon a promissory note. The defendant pleaded his discharge in bankruptcy. Upon the trial, after proof of the discharge, plaintiff offered to prove a subsequent promise of the defendant to pay the note. Defendant objected upon the ground that the action was upon the note, not upon the new promise. The Court sustained the objection, and directed a verdict for defendant, which was rendered accordingly.

D. M. Porter for the appellant.

Cephas Brainerd for the respondent.

ANDREWS, J. The thirty-fourth section of the bankrupt law declares that a discharge in bankruptcy releases the bankrupt from all debts provable under the act, and that it may be pleaded as a full and complete bar to all suits brought thereon.

The legal obligation of the bankrupt is by force of positive law discharged, and the remedy of the creditor existing at the time the discharge was granted to recover his debt by suit is barred. But the debt is not paid by the discharge. The moral obligation of the bankrupt to pay it remains. It is due in conscience, although discharged in law, and this moral obligation,

uniting with a subsequent promise by the bankrupt to pay the debt, gives a right of action. It was held in *Shippy v. Henderson*, 14 J. R. 178, that it was proper for the plaintiff, when the bankrupt had promised to pay the debt after his discharge, to bring his action upon the original demand, and to reply the new promise in avoidance of the discharge set out in the plea. The Court, following the English authorities, said that the replication of the new promise was not a departure from the declaration, but supported it by removing the bar interposed by the plea, and that in point of pleading it was like the cases where the defence of infancy or the Statute of Limitations was relied upon. The case of *Shippy v. Henderson* was followed in subsequent cases, and the doctrine declared in it became, prior to the Code, the settled law. (*McNair v. Gilbert*, 3 Wend. 344; *Wait v. Morris*, 6 Wend. 394; *Fitzgerald v. Alexander*, 19 Wend. 402.)

The question whether the new promise is the real cause of action, and the discharged debt the consideration which supports it, or whether the new promise operates as a waiver by the bankrupt of the defence which the discharge gives him against the original demand, has occasioned much diversity of judicial opinion. The former view was held by Marcy, J., in *Deputy v. Swart*, 3 Wend. 139, and is probably the one best supported by authority. But, after as before the decision in that case, the Court held that the original demand might be treated as the cause of action, and, for the purpose of the remedy, the decree in bankruptcy was regarded as a discharge of the debt *sub modo* only, and the new promise as a waiver of the bar to the recovery of the debt created by the discharge. We are of opinion that the rule of pleading, so well settled and so long established, should be adhered to. The original debt may still be considered the cause of action for the purpose of the remedy. The objection that, as no replication is now required, the pleadings will not disclose the new promise, is equally applicable where a new promise is relied upon to avoid the defence of infancy or the Statute of Limitations, and in these cases the plaintiff may now, as before the Code, declare upon the original demand. (*Esselstyn v. Weeks*, 12 N. Y. 635.)

The offer of the plaintiff to prove an unconditional promise by the defendant, after his discharge to pay the debt, was improperly overruled, and the judgment should, for this reason, be reversed, and a new trial ordered with costs to abide the event.

All concur, except FOLGER, J., not voting.

Judgment reversed.

SAMUEL HAYWARD v. GEORGE BARKER AND WIFE.

IN THE SUPREME COURT OF VERMONT, JANUARY TERM, 1880.

[Reported in 52 Vermont Reports 429.]

GENERAL ASSUMPSIT brought to the Municipal Court of Rutland. Trial by the Court, Everts, J.

It appeared that the debt that was sought to be recovered was incurred by the defendant wife before her intermarriage with the defendant husband, and while she was the wife of one Washburn, but while she lived apart from him. It appeared that Washburn deserted her without any agreement for separation or for separate maintenance, and contributed nothing to her support ; that she, being engaged in no business, supported herself by such work as she could get to do ; and that, while she was living apart from Washburn as aforesaid, she became indebted to the plaintiff, who knew she was a married woman, for groceries and other goods purchased by her on her own credit, and used by her in her own support. At about the same time the plaintiff being about to enforce a demand against the wife's brother, which was secured by a lien on a sewing-machine, the wife was induced to assume her brother's debt, and accordingly gave the plaintiff her promissory note for \$33.75, the amount of her account for goods and of her brother's debt, and took the machine, which she kept until after this action was brought. The wife afterward obtained a divorce, and married the defendant husband. After the divorce, and before the marriage, the wife promised the plaintiff to pay the amount of her note and interest, but there was no new consideration for such promise.

The Court rendered judgment, *pro forma*, for the plaintiff for the amount of the note, with interest and cost ; to which the defendants excepted.

J. B. Phelps for the defendants.

J. C. Baker for the plaintiff.

The opinion of the Court was delivered by

BARRETT, J. Whether this suit can be maintained depends on the legal quality and force of the promise made by the wife after her divorce from her first husband, and while sole, before marrying her present husband, the co-defendant in this case. The property for the payment for which she made the promise while so sole, had been sold to her while under coverture with her former husband. If that promise so bound her that an

action could have been maintained upon it against her before marrying her present husband, then this action can be maintained against her and said husband. Otherwise it cannot be maintained. It is agreed that any contract or promise she made when she procured the property to pay for it was wholly void in law, and not enforceable in any way or at any time. But it is claimed that a moral obligation sprung from the receiving of the property as upon a purchase, which constituted a legal and valid consideration for the alleged promise made while she was afterward sole, and that promise became an actionable contract.

The moral obligation spoken of in the cases as being a sufficient consideration to maintain an express promise is always in reference to and springing from a transaction or a subject as to which the party at the time had already made, or was capable of making, a contract that would not be void. In *Barlow v. Smith*, 4 Vt. 139, the subject of moral obligation was not involved. It was a case upon an express promise in writing that showed no consideration on its face, and no subject for any antecedent moral obligation was claimed to exist. The remarks of Baylies, J., on the subject of moral obligation as a consideration were *obiter*. Yet all his illustrations fall within the assertion above made. In *Glass v. Beach*, 5 Vt. 172, there was a legal consideration for the promise, which was continuing and operative at the time the promise alleged in the declaration was made. So it was not even the case of a past consideration. In *Boothe v. Fitzpatrick*, 36 Vt. 681, there was a subject matter and competent parties for the making of a valid contract at the time the consideration was accruing by the keeping of the beast for the benefit of the defendant by the plaintiff. If such keeping had been by the request of defendant, there would have been a contract upon a present legal consideration for the promise which the law would have implied. The express promise in that case was held to be equivalent to a previous request. This was the only point material to be held in order to maintain the transaction as a contract of promise upon legal consideration. The moral element had no function in the case. There was a contract made up entirely and exclusively of legal elements.

In the case in hand it is agreed that at the time she had the articles of the plaintiff, the female defendant did not and could not make a promise to pay that was not void. The promise thus made could not be ratified and confirmed, and thus have effect by reason thereof, as in case of infancy, bankruptcy, Statute of Limitations, and the like. No obligation, moral or legal, in the sense of any of the cases or the *dicta* of judges and

text-books, could be said to spring from a transaction in reference to which she was utterly incapable of making a contract that would not be void—utterly incapable of making a contract that could become operative by ratification. What is claimed is not that the promise made after the divorce ratified a promise or a contract made by her during coverture, but that such promise makes a valid new contract by virtue of a previous transaction that could not become an element in a valid contract at the time when it was transacted.

The utmost extent to which any case has gone that can be considered as carrying force as authority, is by way of obviating the effect of the doctrine as to promises upon past considerations, when literally applied—the holding that where “the consideration, even without request, moves directly from the plaintiff to the defendant, and inures directly to the defendant’s benefit, the promise is binding, though made upon a past consideration.” The promise made by the female defendant after the divorce would not have been actionable against her in a suit brought while sole. It follows of course that it is not actionable in a suit against her and her present husband. The state of the law on this subject is shown in 1 Chit. Cont. 52 *et seq.* (see note c, 56), and the distinctions named in this opinion are recognized and regarded.

This state of the law is not inconsistent with the holding and decision 36 Vt. *supra*, as therein said by Judge Peck.

Judgment reversed, and judgment for defendants.

KENT v. RAND, ADMINISTRATOR.

IN THE SUPREME COURT OF NEW HAMPSHIRE, JUNE, 1886.

[*Reported in 64 New Hampshire Reports 45.*]

ASSUMPSIT for money had and received by the defendant’s intestate, Mary Snow, to the plaintiff’s use. Facts found by a referee. In the summer of 1855 Mary Snow, being then a married woman, borrowed from the plaintiff \$275 for the use of her husband in his own business. At that time she had title by deed from her father of his homestead in Rochester, of which her father held a life lease from her. Her husband died in 1858, her father in 1859, and her mother in 1860. The referee also found facts which, it was claimed, showed promises by Mary Snow to pay the debt, made on several occasions between

1855 and the time of her death in 1883, while she was sole and the owner of property in her own right, the latest of which was within six years before her death.

Worcester & Gafney for the plaintiff.

T. J. Smith and *J. G. Hall* for the defendant.

SMITH, J. When the defendant's intestate borrowed the sum of \$275 of the plaintiff in 1855 she was a married woman. The money was borrowed for the use of her husband in his business, and there is no evidence that it was otherwise used or applied. She had, at the time of the loan, title by deed to her father's homestead in Rochester, subject to her lease to him for the term of his life. It does not appear that she held this property to her sole and separate use, or that the promise made by her to the plaintiff was in respect to her separate property. Her common-law disability, therefore, rendered her contract void. *Bailey v. Pearson*, 29 N. H. 77; *Ames v. Foster*, 42 N. H. 381; *Shannon v. Canney*, 44 N. H. 592; *Hammond v. Corbett*, 51 N. H. 311; *Batchelder v. Sargent*, 47 N. H. 262; *Muzzey v. Reardon*, 57 N. H. 378; *Read v. Hall*, 57 N. H. 482; *Messer v. Smyth*, 58 N. H. 298; *Penacook Savings Bank v. Sanborn*, 60 N. H. 558. The question then is, whether *assumpsit* can be maintained upon her promise to pay the debt made after the death of her husband; or, in other words, whether a moral obligation to pay money or perform a duty is a good consideration for a promise to pay or to do the duty.

In a note to *Wennall v. Adney*, 3 Bos. & Pull. 249, is a review of many of the English cases, the result being summed up as follows: "An express promise, therefore, as it should seem, can only revive a precedent good consideration, which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision." The doctrine of this note is approved in *Smith v. Ware*, 13 Johns. 257; *Mills v. Wyman*, 3 Pick. 207; *Goodright v. Straphan*, Cowp. 201; *Littlefield v. Shee*, 2 B. & Ad. 811; *Meyer v. Haworth*, 8 A. & E. 467; *Eastwood v. Kenyon*, 11 A. & E. 438; *Jennings v. Brown*, 9 M. & W. 501, and in 1 Pars. Cont. 432-436.

In *Lloyd v. Lee*, 1 Stra. 94 (decided in 1718), the facts were these: A married woman gave a promissory note as a *feme sole*, and after her husband's death, in consideration of forbearance, promised to pay it. In an action against her it was insisted that though being under coverture at the time of giving the note, it was voidable for that reason; yet by her subsequent

promise, when she was of ability to make a promise, she had made herself liable, and the forbearance was a new consideration. "But the Chief Justice held the contrary, and that the note was not barely voidable, but absolutely void ; and forbearance, where originally there is no cause of action, is no consideration to raise an *assumpsit*. But he said it might be otherwise where the contract was but voidable. And so the plaintiff was called."

Lee v. Muggeridge, 5 Taunt. 36 (decided in 1813), a similar case, was decided the other way. The facts were as follows : A married woman, having an estate settled to her separate use, gave a bond for repayment by her executors of money advanced at her request on security of the bond to her son-in-law. After her husband's decease she wrote a letter addressed to the plaintiff, stating "that it was not in her power to pay the bond off, her time here was short, and that it would be settled by her executors." The plaintiff brought *assumpsit* on this promise against her executors, and recovered a verdict. The defendants moved in arrest of judgment, on the ground that no sufficient consideration was shown for the promise. The verdict was sustained upon the ground that a moral obligation is a good cause for a promise to pay.

In *Littlefield v. Shee*, 2 B. & Ad. 811 (A.D. 1831), the facts were these : The plaintiff's testate in his lifetime supplied the defendant, a married woman whose husband was absent, with butcher's meat. After the death of her husband the defendant promised to pay when it should be in her power, and her ability to pay was proved at the trial. The plaintiff was nonsuited, and the nonsuit was sustained upon the ground that it appeared the goods were supplied to the wife while her husband was living, so that the price constituted a debt due from him. Lord Tenterden, C.J., in alluding to *Lee v. Muggeridge*, said : "The doctrine that a moral obligation is a sufficient consideration for a subsequent promise is one which should be received with some limitation."

In *Meyer v. Haworth*, 8 A. & E. 467 (A.D. 1838), the defendant pleaded coverture to a declaration in *assumpsit* for goods sold and delivered. The plaintiff replied that the defendant was at the time of the contract separated from her husband, and living in open adultery ; that the plaintiff did not know of the marriage or adultery ; and that the defendant, after her husband's death and before action brought, in consideration of the premises, promised to pay. Upon demurrer Lord Denman, C.J., said the subsequent promise was "not sufficient. The debt was never owing from her. If there was a moral obligation,

that should have been shown." Littledale, J., said : " If there was any moral obligation, it should have been stated. The replication does not support the declaration. The promise in the declaration was altogether void. This is not like the case of an infant whose promise is voidable only."

Eastwood v. Kenyon, 11 A. & E. 438 (A.D. 1840), decides that a pecuniary benefit voluntarily conferred by the plaintiff and accepted by the defendant is not such a consideration as will support an action of *assumpsit* on a subsequent express promise by the defendant to reimburse the plaintiff. Lord Denman, C.J., commenting on *Lee v. Muggeridge*, said the remark of Lord Tenterden in *Littlefield v. Shee*, " that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise is one which should be received with some limitation," amounts to a dissent from the authority of that case.

Cockshott v. Bennett, 2 T. R. 763 (A.D. 1788), decides that a subsequent promise to pay a note void on the ground of fraud, is a promise without consideration which will not maintain an action ; and in *Jennings v. Brown*, 9 M. & W. 501, it was said, " A mere moral consideration is nothing."

Attempts have been made to distinguish the case of *Lee v. Muggeridge* from *Lloyd v. Lee* and subsequent cases ; but the doctrine of the note in *Wennall v. Adney*, that a mere moral obligation is not sufficient to support an express promise is generally recognized as correct. *Mills v. Wyman*, 3 Pick. 207 ; *Loomis v. Newhall*, 15 Pick. 159 ; *White v. Bluett*, 24 E. L. & E. 434 ; *Cook v. Bradley*, 7 Conn. 57 ; *Hawley v. Farrar*, 1 Vt. 420 ; *Ingraham v. Gilbert*, 20 Barb. 152 ; *Bates v. Watson*, 1 Sneed, 376 ; *Parker v. Carter*, 4 Munf. 273 ; *M'Pherson v. Rees*, 2 Penr. & W. 521 ; *Frear v. Hardenbergh*, 5 Johns. 272 ; *Society v. Wheeler*, 2 Gall. 143 ; *Broom Leg. Max.* 746 ; 1 Pars. Cont. 432 note *t*, 435 ; *Langdell, Sum. Law of Cont.*, ss. 71-79.

In cases of bankruptcy and the Statute of Limitations the law only suspends the remedy. It does not extinguish the debt. *Bank v. Wood*, 59 N. H. 407 ; *Badger v. Gilmore*, 33 N. H. 361 ; *Wiggin v. Hodgdon*, 63 N. H. 39. The contracts of infants are voidable, and may be ratified by an express promise after age. In this respect they are distinguished from the contracts of married women, which, owing to the disability of coverture, are void at common law. Being void, no debt ever existed ; and hence they furnish no consideration for a subsequent promise made during widowhood. *Watkins v. Halstead*, 2 Sandf. 311 ; *Waters v. Bean*, 15 Geo. 358 ; 1 Pars. Cont. 435. This doctrine has received assent in this State. *French v. Benton*, 44 N. H. 28, 31.

It has been assumed in this discussion that the defendant's testate promised to pay the debt within six years of her death. Whether the evidence was sufficient to warrant such a finding is a question we have no occasion to consider. The defendant is entitled to judgment on the report.

BINGHAM, J., did not sit ; the others concurred.

Case discharged.

CHAPTER II.

CONTRACTS UNDER SEAL.

SECTION I.—SIGNING AND SEALING.¹

CROMWELL v. GRUNSDEN.

IN THE KING'S BENCH, EASTER TERM, 1698.

[Reported in 2 Salkeld 462.]

IN debt upon an obligation, the plaintiff declared, *quod cum Robertus Erlin, primo die Julii 1674, per scriptum suum obligatorium concessit se teneri and firmiter obligari in quadragint. libris, etc. Et profert, etc., cujus dat. est eisdem die and anno.* Upon *non est factum* pleaded, the jury found the defendant made a deed in *hæc verba*, and that was, *in premid. vigin. in quadrans libris*, dated July 1st, *anno regni Car. 2, millino sexcent. septua. qto.*, and signed Robert Erlwin, conditioned to pay £20, and if this be the same deed, etc. *Et per Cur.*

First, the variance between the name signed, which is Erlwin, and the name in the obligation, which is Erlin, is not material, because subscribing is no essential part of the deed ; sealing is sufficient. The bond is a deed without it, and so it is of the year of the king. See Yelv. 193.²

WARREN v. LYNCH.

IN THE SUPREME COURT OF JUDICATURE OF NEW YORK,
FEBRUARY TERM, 1810.

[Reported in 5 Johnson 239.]

THIS was an action of *assumpsit* brought by the plaintiff, as the first endorser of a promissory note, against the defendant as maker. The note was as follows :

“ PETERSBURG, VA., August 27, 1807.

“ Four months after date I promise to pay Hopkins Robert-

¹ It has been found desirable to insert in this chapter cases arising upon sealed instruments not contractual in character.—ED.

² Only so much of the case is given as relates to this question.—ED.

son or order, the sum of \$719.12½ cents, witness my hand and seal. Payable in New York.

“ THOMAS LYNCH. (L.S.) ”

The flourish and initials L. S. at the end of the maker's name constituted what was called his seal. The defendant pleaded *non assumpsit*, with notice of special matter to be given in evidence at the trial.

In a conversation between the plaintiff and defendant, at the office of the plaintiff's attorney, before any suit was commenced, the defendant admitted the execution of the note, but said he did not consider himself answerable, having paid the amount to Mason & Smedes, of New York, under certain proceedings against him in Virginia. On its being suggested that some difficulty might arise in declaring on the note, as it purported to be sealed, and a suit was in contemplation, the defendant signed a written agreement dated April 15th, 1808, entitled in the cause, declaring that the note upon which the suit was brought, though it purported to be sealed, had, in fact, no wafer or wax thereto, and was to be considered as a common promissory note, and that all objections as to form were to be waived.

It was admitted by the plaintiff's counsel that by the laws of Virginia a note executed in the manner this was had all the efficacy of an instrument sealed with a wafer or wax.

The judge at the trial was of opinion, on this evidence, that the note was to be considered as a negotiable promissory note, and the plaintiff as an innocent holder for a valuable consideration.

To prove that the defendant had paid the amount of the note to Mason & Smedes, of New York, and to impeach the title of the plaintiff, the following evidence, though objected to by the plaintiff, was admitted by the judge.¹

On this evidence the judge was of opinion that the plaintiff was entitled to recover, and under his direction the jury found a verdict for the plaintiff for the amount of the note with interest.

Baldwin for the defendant.

T. L. Ogden, contra.

KENT, C.J., delivered the opinion of the Court. The two questions made upon this case are : 1. What is the legal import of the instrument upon which the suit is brought ?² and 2. Was the evidence sufficient to entitle the plaintiff to recover ?

¹ The statement of evidence has been omitted.—ED.

² Only so much of the opinion is given as relates to this question.—ED.

1. The note was given in Virginia, and by the laws of that State it was a sealed instrument or deed. But it was made payable in New York, and according to a well-settled rule, it is to be tested and governed by the law of this State. (4 Johns. Rep. 285.) Independent then of the written agreement of the parties (and on the operation of which some doubt might possibly arise), this paper must be taken to be a promissory note, without seal, as contradistinguished from a specialty. We have never adopted the usage prevailing in Virginia and in some other States, of substituting a scrawl for a seal ;¹ and what was

¹ Was the will of Ellen Waln under seal? This is the question upon which the determination of this case depends. It is plain that in the preparation of her last will, the testatrix intended to exercise this power of appointment and to exercise it in the way designated by the donor. She made particular reference to the property over which she had the power, and in proper form and phrase disposed of it, designating and appointing the persons to receive it. She subscribed her name with the mark following, in the presence of two witnesses, and in the testimonium clause states, in terms, that she has affixed her hand and seal. Under such special circumstances may we not assume that the testatrix intended this dash of the pen as a seal? A seal is not necessarily of any particular form or figure ; when not of wax it is usually made in the form of a scroll, but the letters " L. S." or the word " Seal," enclosed in brackets or in some other design, are in frequent use. It may, however, consist of the outline without any enclosure ; it may have a dark ground or a light one ; it may be in the form of a circle, an ellipse, or a scroll, or it may be irregular in form ; it may be a simple dash or flourish of the pen. *Long v. Ramsay*, 1 S. & R. 72. Its precise form cannot be defined ; that, in each case, will depend wholly upon the taste or fancy of the person who makes it.

The mere fact that in the testimonium clause the testatrix states that she has affixed her hand and seal, is insufficient to constitute the instrument a writing under seal, if in fact there be no seal ; but if there be any mark or impression which might reasonably be taken for a seal, this statement of the testatrix will certainly afford the strongest evidence that the mark was so intended. In *Taylor v. Glaser*, *supra*, there was nothing but a flourish of the pen below the signature, and it was offered to be shown that this accompanied Glaser's ordinary signature. There was nothing on the face of the paper which, in the opinion of the Court, the obligor could have intended for a seal. To the same effect is the case of *Duncan v. Duncan*, 1 W. 322, where a ribbon had been inserted, manifestly as a preliminary to the act of sealing, which act was never performed.

Whether the instrument is under seal or not, is a question to be determined by the Court upon inspection ; and whether or not any mark or impression shall be held to be a seal, depends wholly upon the intention of the party executing the instrument, as exhibited on the face of the paper itself. The dash, which follows the signature in this case, it must be conceded, is not in the usual or ordinary form of a seal, but as no particular form is prescribed by law, we think that upon a consideration of the plain requirements of the writing creating the power, and of the manifest purpose and effort of the testatrix to execute that power, in the manner designated, and her avowed purpose to affix a seal, together with the presence of a mark or

said by Livingston, J., in the case of *Meredith v. Hinsdale*, 2 Caines, 362, in favor of such a substitute, was his own opinion and not that of the Court. A seal, according to Lord Coke (3 Inst. 169), is wax with an impression. *Sigillum est cera impressa, quia cera sine impressione non est sigillum*. A scrawl with a pen is not a seal, and deserves no notice. The law has not indeed declared of what precise materials the wax shall consist; and whether it be a wafer or any other paste or matter sufficiently tenacious to adhere and receive an impression, is perhaps not material. But the scrawl has no one property of a seal. *Multum abludit imago*. To adopt it as such would be at once to abolish the immemorial distinction between writings sealed and writings not sealed. Forms will frequently, and especially when they are consecrated by time and usage, become substance. The calling a paper a deed will not make it one if it want the requisite formalities. "Notwithstanding, says Perkins (§ 129), that words obligatory are written on parchment or paper, and the obligor delivereth the same as his deed, yet if it be not sealed, at the time of the delivery, it is but an *escrow*, though the name of the obligor be subscribed." I am aware that ingenious criticism may be indulged at the expense of this and of many of our legal usages, but we ought to require evidence of some positive and serious public inconvenience before we, at one stroke, annihilate so well-established and venerable a practice as the use of seals in the authentication of deeds. The object in requiring seals, as I humbly presume, was misapprehended both by President Pendleton and by Livingston, J. It was not, as they seem to suppose, because the seal helped to designate the party who affixed it to his name. *Ista ratio nullius pretii*, says Vinnius, in Inst. 2, 10, 5, *nam et alieno annulo signare licet*. Seals were never introduced or tolerated in any code of law, because of any family impression or image or initials which they might contain. One person might always use another's seal, both in the English and in the Roman law. The policy of the rule consists in giving ceremony and solemnity to the execution of important instruments, by means of which the attention of the parties is more certainly and effectually drawn to the act. The flourish of the pen, which may be taken as such, we are justified in assuming that the mark was made and intended for a seal, and that the writing is in this respect in compliance with the donor's directions. It is said that the same or a similar mark is found in other parts of the will, used for punctuation, and that this is a circumstance evidencing a different intention of the testatrix. But if the testatrix did use a mark in this form indifferently for a comma, a colon, or a period, what good reason is there for supposing she did not also use it for a seal?—Clark, J., Hacker's Appeal, 121 Pa. St. 192, 203-205.—ED.

tually fixed, and frauds less likely to be practised upon the unwary. President Pendleton, in the case of *Jones and Temple v. Logwood*, 1 Wash. Rep. 42, which was cited upon the argument, said that he did not know of any adjudged case that determines that a seal must necessarily be something impressed on wax; and he seemed to think that there was nothing but Lord Coke's opinion to govern the question. He certainly could not have examined this point with his usual diligence. The ancient authorities are explicit, that a seal does, in legal contemplation, mean an impression upon wax. "It is not requisite," according to Perkins (§ 134), "that there be for every grantor who is named in the deed a several piece of wax, for one piece of wax may serve for all the grantors if every one put his seal upon the same piece of wax." And Brooke (tit. Faits, 30 and 17) uses the same language. In *Lightfoot and Butler's Case*, which was in the Exchequer, 29 Eliz. (2 Leon. 21) the Barons were equally explicit as to the essence of a seal, though they did not all concur upon the point, as stated in Perkins. One of them said that twenty men may seal with one seal upon one piece of wax only, and that should serve for them all, if they all laid their hands upon the seal; but the other two Barons held that though they might all seal a deed with one seal, yet it must be upon several pieces of wax.¹ Indeed this point, that the seal was an impression upon wax, seems to be necessarily assumed and taken for granted in several other passages which might be cited from Perkins and Brooke, and also in Selden's Notes to Fortescue (*De Laud.* p. 72); and the nature of a seal is no more a matter of doubt in the old English law than it is that a deed must be written upon paper or parchment, and not upon wood or stone.² Nor has the common law ever been altered in Westminster Hall upon this subject, for in the late case of *Adam v. Keer*, 1 Bos. & Puller, 360, it was made a question whether a bond executed in Jamaica, with a scrawl of the pen, according to the custom of that island, should operate as such in England, even upon the strength of that usage.

¹ It is true that one piece of wax may serve as a seal for several persons, if each of them impresses it himself, or one for all, by proper authority, or in the presence of all, as was held in *Ball v. Dunsterville** following Lord Lovelace's Case,† but then it must appear by the deed and profess to be the seal of each, whereas here the seal appears by the deed, and professes to be the seal not of individuals, but of a corporation. Lord Denman, C.J., *Cooch v. Goodman*, 2 Q. B. 580, 598.—ED.

² This writing must be in paper or parchment, for if an agreement be written on a piece of wood, linen, the bark of a tree, a stone, or the like, and this be sealed and delivered, this is no good deed. Sheppard's Touchstone, 54.—ED.

* 4 T. R. 313.

† W. Jones, 268.

The civil law understood the distinction and solemnity of seals as well as the common law of England. Testaments were required not only to be subscribed, but to be sealed by the witnesses. *Subscriptionē testium, et ex edicto prætoris, signacula testamentis imponerentur* (Inst. 2, 10, 3). The Romans generally used a ring, but the seal was valid in law, if made with one's own or another's ring; and, according to Heineccius (*Elementa juris civilis secundum ord.*, Inst. 497), with any other instrument which would make an impression, and this, he says, is the law to this day throughout Germany. And let me add that we have the highest and purest classical authority for Lord Coke's definition of a seal, *Quid si in ejusmodi cera centum sigilla hoc annulo impresero?* (Cicero. Academ. Quæst. Lucul. 4, 26.)

Rule refused.

PARKS v. HAZLERIGG AND OTHERS.

IN THE SUPREME COURT OF INDIANA, DECEMBER 4, 1845.

[Reported in 7 Blackford 536.]

ERROR to the Hendricks Circuit Court.

SULLIVAN, J. This was an action of debt on an appeal-bond. The plaintiff declared against Hazlerigg, Kizer, Russell, and Dugan; for that the defendants, on, etc., at, etc., by their certain writing obligatory sealed with their seals, etc., acknowledged themselves to be held and firmly bound, etc. On *oyer* it appeared that the above defendants were named in the bond as obligors. There were four seals affixed to the bond, but it was signed only by Hazlerigg, Russell, and Dugan. Opposite to the fourth seal there was no signature. Demurrer to the declaration and judgment for the defendants.

This case presents the simple question, whether it is necessary to the validity of a bond, which has been sealed by the obligor, that it be signed by him also.

At common law, signing was not necessary to the validity of a deed. 2 Blacks. Comm. 305-306. *Cromwell v. Grunsden*, 2 Salk. 462. To this point it is not necessary to multiply authorities. It has been intimated that since the Statute of Frauds and Perjuries, signing, as well as sealing, is necessary, 2 Blacks. Comm., *supra*; but the better opinion seems to be, that the statute has made no alteration in this respect, since it applies only to mere agreements and not to deeds. 1 Shepp. Touch., by Preston, 56, note 24; Hurlstone on Bonds, 8.

"Signing," says Gresley, in his Equity Evidence, p. 121, in speaking of the execution of a deed, "is not ordinarily essential, but it is always as well to prove it as a regular part of the transaction. Besides, it assists the other parts of the proof of execution, for the circumstance that the party has written his name opposite to the seal, on an instrument bearing on its face a declaration that it was sealed by him, is *prima facie* evidence of sealing and delivery." The common law, therefore, remains unchanged, and signing was not essential to the validity of the bond declared on in this case. If the plaintiff can prove that Kizer, with the other defendants, sealed the bond, the proof will support the declaration, which is in the usual form. The Court erred in sustaining the demurrer.

Per CURIAM. The judgment is reversed with costs. Cause remanded, etc.

C. C. Nave for the plaintiff.

JEROME B. PILLOW, PLAINTIFF IN ERROR, v. TRUMAN ROBERTS.

IN THE SUPREME COURT OF THE UNITED STATES, DECEMBER TERM, 1851.

[Reported in 13 Howard 472.]

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Eastern District of Arkansas.

The circumstances of the case, and the points of law upon which it came up to this Court, are fully stated in its opinion.

Lawrence and *Pike* for the plaintiff in error.

Crittenden for the defendant in error.

GRIER, J., delivered the opinion of the Court.

Roberts, the defendant in error, was plaintiff below, in an action of ejectment for 160 acres of land. Pillow, the defendant below, pleaded the general issue, and two special pleas. The first, setting forth a sale of the land in dispute, for taxes more than five years before suit brought. The second, pleading the Statute of Limitation of ten years. These pleas were overruled on special demurrer, as informal and insufficient; and the judgment of the Court on this subject is here alleged as error. But as the same matters of defence were afterward offered to be laid before the jury on the trial of the general issue and overruled by the Court, it will be unnecessary to

further notice the pleas ; as the defence set up by them, if valid and legal, should have been received and submitted to the jury on the trial. In the action of ejectment (with the exception, perhaps, of a plea to the jurisdiction) any and every defence to the plaintiff's recovery may be given in evidence under the general issue. And as the decision of the Court on the bills of exception will reach every question appertaining to the merits of the case, it will be unnecessary to decide whether those merits were sufficiently set forth in the special pleas, to which the defendant was not bound to resort for the purpose of having the benefit of his defence.

On the trial the plaintiff below gave in evidence a patent for the land in dispute, from the United States to Zimri V. Henry, dated May 7th, 1835 ; and then offered a deed from said Henry to himself, dated November 10th, 1849. This deed purported to be acknowledged before the clerk of the Circuit Court of Walworth County, in the State of Wisconsin, and was objected to, first, because there was no proof of the identity of the grantor with the patentee other than the certificate contained in the acknowledgment. Secondly, because the certificate of acknowledgment was not on the same piece of paper that contained the deed, but on a paper attached to it by wafers. And, thirdly, because the seal of the Circuit Court authenticating the acknowledgment was an impression stamped on paper, and not "on wax, wafer, or any other adhesive or tenacious substance."

The first two of these grounds of objection have not been urged in this Court, and very properly abandoned as untenable. The third has been insisted on, and deserves some more attention.¹ Formerly wax was the most convenient, and the only material used to receive and retain the impression of a seal. Hence it was said : "*Sigillum est cera impressa ; quia cera, sine impressione, non est sigillum.*" But this is not an allegation, that an impression without wax is not a seal. And for this reason courts have held that an impression made on wafers or other adhesive substance capable of receiving an impression, will come within the definition of *cera impressa*. If, then, wax be construed to be merely a general term including within it any substance capable of receiving and retaining the impression of a seal, we cannot perceive why paper, if it have that capacity, should not as well be included in the category. The simple and powerful machine, now used to impress public seals, does not require any soft or adhesive substance to receive or retain their impression. The impression made by such a power on

¹ Only so much of the opinion is given as relates to this question.—ED.

paper is as well defined, as durable, and less likely to be destroyed or defaced by vermin, accident, or intention, than that made on wax. It is the seal which authenticates, and not the substance on which it is impressed; and where the Court can recognize its identity, they should not be called upon to analyze the material which exhibits it. In Arkansas, the presence of wax is not necessary to give validity to a seal; and the fact that the public officer in Wisconsin had not thought proper to use it, was sufficient to raise the presumption that such was the law or custom in Wisconsin till the contrary was proved. It is time that such objections to the validity of seals should cease. The Court did not err, therefore, in overruling the objections to the deed offered by the plaintiff.

The judgment of the Circuit Court is therefore reversed, and a *venire de novo* ordered.¹

¹ The release purported to be signed by the plaintiff and various other creditors of the defendant Taylor. It was produced before the Court on the trial, and the Court could decide from inspection whether or not it was under seal. No oral evidence on the subject is contained in the case. The only ground upon which the exception to this finding rests is, that in the printed copy of the release contained in the case, a two-cent internal revenue stamp appears opposite the signature of each creditor, in the place appropriate for a seal. There is nothing in the case to show that these stamps were not used as seals, or laid over some substance capable of receiving an impression, and employed for that purpose. In the absence of any such evidence the finding of the Court, based upon an inspection of the instrument, cannot be disturbed.—Rapallo, J., *Van Bokkelen v. Taylor*, 62 N. Y. 105, 108.—Ed.

The certificate of the protest of the bill of exchange by the notary in Norway was properly received in evidence. It is in due form, and bears what purports to be the seal of the notary. The seal, it is true, is impressed directly on the paper by a die with which ink was used. This is evident from inspection of the original, which has been transmitted to us from the Court below for our personal examination.

The use of wax, or some other adhesive substance upon which the seal of a public officer may be impressed, has long since ceased to be regarded as important. It is enough, in the absence of positive law prescribing otherwise, that the impress of the seal is made upon the paper itself in such a manner as to be readily identified upon inspection.

The language used in *Pillow v. Roberts*, reported in 13 Howard, as to the sufficiency of a seal of a court impressed upon paper instead of wax or a wafer, is applicable here. Said the Court, speaking by Grier, J.: "Formerly, wax was the most convenient and the only material used to receive and retain the impression of a seal. Hence it was said: *Sigillum est cera impressa; quia cera, sine impressione non est sigillum*. But this is not an allegation that an impression without wax is not a seal, and for this reason courts have held, that an impression made on wafers or other adhesive substances capable of receiving an impression, will come within the definition of '*cera impressa*.' If, then, wax be construed to be merely a general term including within it any substance capable of receiving and

JACKSONVILLE, MAYPORT, PABLO RAILWAY AND
NAVIGATION COMPANY v. HOOPER.IN THE SUPREME COURT OF THE UNITED STATES, JANUARY 13,
1896.*[Reported in 160 United States Reports 514.]*

In the Circuit Court of the United States for the Northern District of Florida, on December 4th, 1889, Mary J. Hooper, Henry H. Hooper, her husband, and William F. Porter, for the use of said Mary J. Hooper, citizens of the State of Ohio, brought an action against the Jacksonville, Mayport, Pablo Railway and Navigation Company, a corporation of the State of Florida. The plaintiffs' amended declaration set up causes of action arising out of the covenants contained in a certain indenture of lease between the parties. This lease, dated July 10th, 1888, purported to grant, for a term of two years, certain lots of land situated at a place called "Burnside," in Duval County, Fla., whereon was erected a hotel known as the "San Diego Hotel." In consideration of this grant the railroad company agreed to pay in monthly instalments a yearly rent of \$800, and to keep the premises insured in the sum of \$6000.

It was alleged that on November 28th, 1889, during said term, and while the railway company was in possession, the hotel and other buildings were wholly destroyed by fire; that the defendant had failed and neglected to have the same insured, and that there was an arrearage of rent due amounting to the sum of \$106.67. For the amount of the loss occasioned by the absence of insurance and for the back rent the action was brought.

The defendant denied that the railway company had duly executed the instrument sued on; denied that Alexander Wallace, the president of the company, and who had executed the lease as such president, had any authority from the company so to do. The defendant also alleged that such a lease, even if

retaining the impression of a seal, we cannot perceive why paper, if it have that capacity, should not as well be included in the category. The simple and powerful machine, now used to impress public seals, does not require any soft or adhesive substance to receive or retain their impression. The impression made by such a power on paper is as well defined, as durable, and less likely to be destroyed or defaced by vermin, accident, or intention than that made on wax. It is the seal which authenticates, and not the substance on which it is impressed, and where the Court can recognize its identity, they should not be called upon to analyze the material which exhibits it."—Field, J., *Pierce v. Indseth*, 106 U. S. 546, 548.—ED.

formally executed, was *ultra vires*; also that the covenant to insure was an impossible covenant, as shown by ineffectual efforts to secure such insurance.

The case was tried in April, 1891, and resulted in a verdict and judgment against the defendants in the sum of \$6798.70. On errors assigned to certain rulings of the Court and in the charge to the jury the case was brought to this Court.

J. C. Cooper for plaintiff in error.

James R. Challen for defendants in error.

SHIRAS, J., after stating the case, delivered the opinion of the Court.

The nineteen assignments of error may be classified as follows: Those which raise questions as to the sufficiency of the proof of the due execution by the defendant of the contract sued on;¹ those which deny the competency of the railroad company to enter into such a contract; those which deal with the question whether the defendant was relieved from liability on its covenant to insure by reason of alleged impossibility to comply therewith; finally, those alleging error in the admission of evidence, and in certain portions of the charge—particularly in respect to the measure of damages. We shall discuss these alleged errors in the order thus mentioned.

The declaration was in covenant, and contained, as an attached exhibit, what was alleged to be a certified copy of the contract sued on, the final clause whereof was as follows:

"In witness whereof the parties hereto have hereunto set their hands and seals this the day and year above written.

"JACKSONVILLE, MAYPORT, PABLO RAILWAY
AND NAVIGATION COMPANY, [Seal.]

"By ALEX. WALLACE, *President*.

"WM. F. PORTER, [Seal.]

"By H. H. HOOPER, JR., *Att'y in fact*.

"H. H. HOOPER. [Seal.]

"MARY J. HOOPER. [Seal.]"

The attesting clause was as follows:

"Signed, sealed, and delivered in the presence of us.

"H. H. BURKMAN,

"H. H. BOWNE,

*As to R. R. Co., H. H. Cooper,
and W. F. Porter.*

"JOHN MULHOLLAND,

"SAM'L E. DUFFY,

As to Mary J. Hooper."

¹ Only so much of the opinion is given as relates to this question.—ED.

The defendant demurred on several grounds, one of which was as follows :

" That attached to the said declaration is a paper purporting to be the contract which is the basis of this suit, which paper is alleged to be a lease between the defendant company and the plaintiffs, and which paper is referred to in each and every count of said declaration, and asked and prayed and made a part of said declaration ; that each and every count of same declares in covenant, and yet the same contains on the face thereof and the face of the paper made part thereof that the said cause of action will not lie because the said paper is not under seal ; that there is no seal of the defendant company to said paper."

The theory of this demurrer appears to be that there should have been an averment on the face of the instrument that the seal attached, on behalf the company, was its common or corporate seal. However, there was an averment that the parties had set their hands and seals to the paper, and the attesting clause alleged that the railroad company had signed, sealed, and delivered in the presence of two witnesses, who signed their names thereto. On demurrer this was plainly sufficient.

But it is urged in the third and fourth assignments that it was error to permit to be put in evidence the certified copy of the lease, as likewise the duplicate lease, because they were not shown to be under the seal of the company, but appeared to be under the private seal of Alexander Wallace, the president of the company. But, in the absence of evidence to the contrary, the scroll or rectangle containing the word " seal" will be deemed to be the proper and common seal of the company. A seal is not necessarily of any particular form or figure.

In *Pillow v. Roberts*, 13 How. 472, 474, this Court said, through Grier, J., when discussing an objection that an instrument read was improperly admitted in evidence because the seal of the Circuit Court authenticating the acknowledgment was an impression stamped on paper and not " on wax, wafer, or any other adhesive or tenacious substance," said : " It is the seal which authenticates, and not the substance on which it is impressed ; and where the Court can recognize its identity, they should not be called upon to analyze the material which exhibits it. In Arkansas the presence of wax is not necessary to give validity to a seal ; and the fact that the public officer in Wisconsin had not thought proper to use it, was sufficient to raise the presumption that such was the law or custom in Wisconsin, till the contrary was proved. It is time that such objections to the validity of seals should cease. The Court did not

err in overruling the objections to the deed offered by the plaintiff." *Price v. Indseth*, 106 U. S. 546, is to the same effect.

Whether an instrument is under seal or not is a question for the Court upon inspection; whether a mark or character shall be held to be a seal depends upon the intention of the executant, as shown by the paper. *Hacker's Appeal*, 121 Pa. St. 192; *Pillow v. Roberts*, *ub. supra*.

The defendant did not produce the original in order that it might be compared in the particular objected to with the copy and duplicate offered. The defendant's attorney, Buckman, was called, and testified that he was one of the attesting witnesses to the instrument offered, and that he, as a notary public, took the acknowledgment thereto of Alexander Wallace, that he executed the same for and in behalf of the company, and that the said lease was the act and deed of the defendant company for the uses and purposes therein expressed.

Whether, therefore, the instrument put in evidence was merely a copy, in which event it would not be expected that a wax or stamped seal of the company would appear upon it, but merely a scroll, representing the original seal, or whether the so-called copy was really the original paper, as certified by one of defendant's witnesses, would not, in our opinion, be material. The presumption would be, if the paper were a copy, that the original was duly sealed, or, if it were the original, that the scroll was adopted and used by the company as its seal, for the purpose of executing the contract in question.

These views cover all the assignments of error which we deem worthy of notice, and the judgment of the Court below is affirmed.

SECTION II.—DELIVERY.

STEFANOS XENOS AND ANOTHER, APPELLANTS, v.
FRANCIS D. WICKHAM, RESPONDENT.

IN THE HOUSE OF LORDS, MAY 8; JULY 16, 1866.

[*Reported in Law Reports, 2 House of Lords Cases*, 296.]

THIS was an appeal against a decision of the Court of Exchequer Chamber,¹ which (*diss.* Blackburn and Mellor, JJ.) had affirmed a decision of the Court of Common Pleas,² in an action between these parties on a time policy on a ship.

The appellants are shipowners, carrying on business under

¹ 13 C. B. (N. S.) 381.

² *Ibid.* 435.

the name of the Greek and Oriental Steam Navigation Company, and as such were the owners of the ship *Leonidas*. The respondent is the chairman and representative of the Victoria Fire and Marine Insurance Company. The declaration alleged, in the usual form, that the plaintiffs caused their vessel to be insured by this company for the space of twelve months, from April 25th, 1861, to April 24th, 1862, on a policy valued at £1000, upon a ship valued at £13,000, and the loss was alleged to have occurred by perils of the sea. There was also a count in trover for the policy.

The defendant pleaded several pleas, some of which alone are material. The first denied the insurance as alleged; the fourth stated that after the making of the policy the same remained, with the plaintiffs' consent, in the hands of the defendant, and while it so remained, and before the loss, the plaintiffs requested the defendant, for the purpose of putting an end to the policy, to cancel the same and make a return to the plaintiffs of the premium; that, in compliance with such request, and before the loss, the defendant did cancel the policy, and thereby put an end to the risk, etc. To the count in trover the defendant pleaded not guilty, and not possessed.

Issue was taken on all these pleas, and the cause was tried before Lord Erle, C.J., when it appeared that on April 25th, 1861, the plaintiffs employed Lascaridi, an insurance broker, to effect for them a policy on the ship *Leonidas* for £2000 at £8 8s. per cent, from April 25th, to October 25th. In the case of private underwriters at Lloyd's, it is customary to have only one slip, which is signed by the different underwriters for the amounts for which they are willing to undertake the insurance. In the case of insurance companies a separate slip is prepared by the brokers of the assured for each company, and the policy is afterward prepared and filled up from the slip by the officers of the company, and is kept by the company until sent for by the assured or his broker.

In accordance with the usual practice Lascaridi prepared for the respondent's company a slip embodying the terms of the proposed insurance, and got it initialed by E. J. Sprange, a clerk of the company, for the sum of £2000. This was left at the office of the company in order that the policy might be made out. Before the policy was made out, the plaintiffs sent to Lascaridi a letter, dated April 29th, 1861, desiring him to "cancel *Leonidas* insurance, and insure the same for all the year and for all seas at £10 10s. per cent." On April 30th Lascaridi called at the respondent's office, and stated that he did not wish the policy already mentioned to proceed, but de-

sired to effect another. The slip for the insurance for £2000 for six months was then destroyed, and another slip was prepared by him, and initialed by the respondent's clerk, "E. J. S.," on the Leonidas for £1000 for twelve months, from April 25th, 1861, on "hull, stores, and machinery, valued at £13,000." On May 1st Lascaridi sent to the plaintiffs an account debiting them with the sum of £338, as payable by them in respect of insurances on the Leonidas, and drew on them, as of that date, for that sum at three months. They accepted the bill, and when they did so Lascaridi told them that the policy would be ready in a day or two. This bill was paid at maturity. In the course of a few days afterward a policy in the usual form of the company was filled up from the slip, and was dated May 1st, 1861.

The custom, as between insurance companies and insurance brokers, is for the companies to give credit to the brokers for the premiums, debiting them in account with the amount of such premiums, and when insurances are effected (as this was) for cash, or on cash account, all premiums for insurances effected during each month are payable on the 8th of the succeeding month. Just before the expiration of this credit a debit note is sent to the broker, with a statement of the amount of the premiums due, less a discount and a brokerage at 15 per cent. On June 8th a debit note was sent from the respondent's office to that of Lascaridi. On its being presented, Lascaridi's clerk said that no premium was due, and, upon a second messenger being sent with the policy, which was expressed to be duly "signed, sealed, and delivered," and the debit note, the clerk repeated the statement, and said that the policy ought not to have gone forward. In the course of the day one of the clerks of Lascaridi called at the office of the company, and said that the policy had been put forward in error, and requested that it should be cancelled. A memorandum of cancellation was thereupon endorsed on the policy in these terms: "Settled a return of the whole premium on the within policy, and cancelled this insurance, no risk attaching thereto." This memorandum was signed by two directors, witnessed, and registered in the regular way. The debit against Lascaridi for the premium was cancelled, but he was charged with the stamp, and the policy was handed to his clerk, with the memorandum of cancellation thereon, that he might, if he could, obtain from the stamp office a return of the stamp duty. On the morning of September 2d, 1861, Lascaridi's clerk called at the office of the company with the policy, said that the cancellation had been made by mistake, and wished the policy to be reinstated. He was informed that if the ship was safe, and not in the Baltic,

there would be no objection, and he was requested to call again for an answer. At twenty minutes past eight o'clock on the morning of that day intelligence, by telegram, had been received at Lloyd's, stating that the *Leonidas* was stranded on the *Nervo*, but this intelligence was not known to the respondent till 3 o'clock in the afternoon of that day. The reinstatement of the policy was then refused. It was admitted that the appellants had not, in fact, authorized the cancellation of the policy, nor did they ever receive back from *Lascaridi* any part of the premium or any credit for the same.

The Lord Chief Justice, on these facts, directed a verdict for the defendant, but reserved leave to the plaintiffs to move to enter a verdict for them if the Court should be of opinion that the policy was binding on the company, and had been cancelled without authority. A rule to that effect having been obtained, it was, after argument, discharged, and this decision was confirmed on appeal to the Exchequer Chamber. The present appeal was then brought.

The judges were summoned, and Lord Pollock, C.B., Willes, Blackburn, Mellor,¹ JJ., Pigott, B., and Smith,¹ J., attended.

George Honyman, Q.C., and *Watkin Williams* for the appellants. *Bovill, Q. C.*, and *Archibald* for the defendant.

The following question was put to the judges :

"Whether, on the facts stated in the special case, the *Victoria Fire and Marine Insurance Company* was, when the ship *Leonidas* was lost, liable as insurer to the plaintiffs on the policy, or alleged policy, in the pleadings mentioned? It is to be assumed that the ship *Leonidas* was totally lost on September 1st, 1861."

PIGGOT, B. My Lords, in answer to your Lordships' question—viz., "Whether, on the facts stated in the special case, the *Victoria Fire and Marine Insurance Company* was, when the ship *Leonidas* was lost, on September 1st, 1861, liable as insurer to the plaintiffs on the alleged policy in the pleadings mentioned," I answer that, in my opinion, the company was so liable.

The facts are very fully and accurately set forth in the judgment delivered by Blackburn, J., in which judgment I entirely agree. It is unnecessary for me to do more than refer to the more prominent ones in stating the grounds of my opinion.²

It is on the circumstance of the policy remaining in the hands of the defendant, as above stated, that the question depends,

¹ The opinions of Mellor and Smith, JJ., have been omitted.—ED.

² A portion of the opinion has been omitted.—ED.

whether the transaction constituted a complete contract in law and fact or not. I am of opinion that it was complete.

What inference might have been drawn from the fact of its so remaining if there were no explanation about it, it is unnecessary to consider; for we have the reason given; and that reason is, not that it awaited anything to be done upon it by the defendant, or to be assented to by the plaintiffs, but that it was there only till sent for by the assured or his broker, or in other words, that it remained there according to the trade usage or by tacit understanding. This reason necessarily implies that in all other respects it was a completed transaction. But farther, it is plain that the formal assent of the plaintiffs was not wanting to any of the terms of the policy, for that was evidently intended to be, and accordingly was, made out in the defendant's usual form, filled up with the particulars from the slip. But farther, the defendant acted upon the policy as a perfected transaction, when, on June 8th, he demanded payment of the premium for which he had given credit to the broker. In the face of this demand, I confess it seems startling that the defendant can be heard to say that there was no complete contract subsisting at that period. It was in form complete, and was shown, by the conduct of all the parties to it, to be believed and intended by them all (apart from Lascaridi's fraud) to be also completely in operation. ✓✓

It seems, therefore, to be reduced to this—viz., Was it essential that the deed should be given out of the defendant's possession in order to its perfect delivery as an operative instrument? I know of no such necessity in law or good sense.

Sheppard, in his Touchstone, writing of the requisites of a good deed, treats, fifthly, of delivery as a matter of fact to be tried by jurors,¹ and by the whole context shows that it is a question of intention. He afterward² says that "Delivery is either actual—*i.e.*, by doing something and saying nothing—or else verbal—*i.e.*, by saying something and doing nothing, or it may be by both; and either of these may make a good delivery and a perfect deed."

Doe d. Garnons v. Knight³ is an authority most satisfactory on this subject, and it is only necessary to quote one passage from the judgment of the Court as delivered by Bayley, J. He says: "Where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to show that he did not intend it to operate immediately, it is a valid and effectual deed, and the delivery to the party who is

¹ Vol. I., ch. 4, p. 54.

² *Ibid.* p. 57.

³ 5 B. & C. 692.

to take by it, or to any person for his use, is not essential." This passage seems to be exactly applicable to the facts of the present case, with this addition, that there is here not only nothing to qualify the delivery, but, as above suggested, much to show that the defendant did intend it to be unqualified, and a deed in full operation.

I therefore answer your Lordships' question in favor of the plaintiffs, and in the affirmative.

BLACKBURN, J. I answer your Lordships' question in the affirmative. Two questions are involved in your Lordships' question. First, whether the policy before June 8th was so executed as to bind the defendant's company to the plaintiffs; second, whether the transaction between the defendant's company and Lascaridi (the plaintiffs' broker) operated so as to release the defendant from the obligation he had contracted to the plaintiffs, supposing the policy to have been so executed.

I have already, in the judgment I delivered in the Court below, expressed the reasons for my opinion at length.¹ And as I have not been induced, by anything I have heard at your Lordships' bar, to alter the opinion I then expressed, I think it better to refer your Lordships to that printed opinion than to repeat the opinion I there gave.

I have had an opportunity of perusing the opinions of my Brothers Willes and Smith, and, if I understand them rightly, they agree with me in thinking that if the policy was binding before June 8th, what occurred subsequently would not discharge the company. I shall, therefore, say nothing more on that branch of the question.

As to the other branch, I should wish to call your Lordships' attention to what I think are the real points in controversy.

They are, I think, two; one of fact, the other of law.

The question of fact is, I think, this: Was the policy really, in fact, intended by both sides to be finally executed and binding from the time when the directors of the defendant's company affixed their seals to it, and left it in their office; or was it, in fact, intended that the assured or their brokers should exercise a subsequent discretion as to whether they would accept it or not.

If I thought that the parties did not, in fact, intend it to be then finally binding, I do not think there would be any magic in the law to make it binding contrary to their intention; but I submit to your Lordships that the statements in the case as to what is stated to be "always" the practice, and the statements there as to what was done in this particular case, show

¹ 13 C. B. (N. S.) 451.

that the intention of both parties was, that the policy, when drawn up by the company in conformity with the instructions in the advice slip sent in by the broker, should be finally binding as soon as executed by the officers of the company. It was not intended by either side that anything more should be done, but that the policy from that time should be binding, and should lie in the company's office as the property of the assured till sent for by them, and then be handed over to their messenger.

It seems that some of the judges take a different view of the fact, and think it really was intended that the policy should not be finally binding till something more was done by the assured. Your Lordships will decide which is the true view of the facts.

Then, assuming that the intention really was that the policy should be binding as soon as executed, and should be kept by the company as a baillee for the assured, the question of law arises, whether the policy could in law be operative until the company parted with the physical possession of the deed.

I can, on this part of the case, do little more than state to your Lordships my opinion, that no particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it. The mere affixing the seal does not render it a deed ; but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him, it is sufficient. The most apt and expressive mode of indicating such an intention is to hand it over, saying : " I deliver this as my deed ;" but any other words or acts that sufficiently show that it was intended to be finally executed will do as well. And it is clear on the authorities, as well as the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee, nay, before he even knows of it ; though, of course, if he has not previously assented to the making of the deed the obligee may refuse it. In *Butler and Baker's Case*,¹ it is said : " If A. make an obligation to B., and deliver it to C. to the use of B., this is the deed of A. presently ; but if C. offers it to B., there B. may refuse it *in pais*, and thereby the obligation will lose its force." I cannot perceive how it can be said that the delivery of the policy to the clerks of the defendant, to keep till the assured sent for it, and then to hand it to their messenger, was not a delivery to the defendant to the use of the assured. There is neither authority nor principle for qualifying the statement in *Butler and Baker's Case*, by saying that C.

¹ 3 Co. Rep 26.

must not be a servant of A., though, of course, that is very material in determining the question whether it was "delivered to C. to B.'s use," which I consider it to be, in other words, whether it was shown that it was intended to be finally executed as binding the obligor at once, and to be thenceforth the property of B. In the present case, the assured could not have refused the deed *in pais*, for it was drawn up in strict pursuance of the authority given by them in the slip set out in the case; and I think a prior authority is at least as good as a subsequent assent. That question, however, does not arise, as they did not refuse it *in pais*.

No authority, I think, has been cited which supports the position that there is a technical necessity for some one who is agent of the assured taking corporal possession of a policy under seal before it can be binding, though intended by both parties to be so. I think it would be very inconvenient, and would work great injustice, if such were the law. I must leave it to your Lordships to determine whether it is so or not.

WILLES, J. My Lords, I answer the question in the negative, that upon the facts stated in the special case, the respondent (who represents the Victoria Fire and Marine Insurance Company) was not, when the ship *Leonidas* was lost, liable as insurer to the plaintiffs on the policy, or alleged policy, in the pleadings mentioned.

Assuming, as upon the statement it must be assumed, that the broker had no authority to revoke this policy, if once completed, so as to be the contract of and binding upon both parties, the question is whether it ever was so completed.

In dealing with this question as a practical one, it must be borne in mind that albeit consent, not corporal possession, makes the contract, yet the plain duty of the broker is not merely to bespeak, but to procure the policy, and to procure it upon his own credit. A loose way of business upon trust cannot abrogate any part of that duty, or make up for the consequence of neglecting it; and, indeed, taking the practice alleged to prevail as a whole, it is for the most part—viz., as to the insurances effected at Lloyd's, consistent with the duty of the broker to effect the policy in such a manner that his employer, or he, on behalf of his employer, should have the policy.

In the case of insurances at Lloyd's, no difficulty can arise, for the broker sends round the policy and procures the signatures. When the policy is effected with a company, therefore, if analogy is to prevail, the broker ought to call for the policy. A careless practice, not stated to have grown into a known usage of trade, may exist of not asking for the policy, but if

this be so, it is pure negligence. Nor can it be doubted that the employer in such a case, equally as in that of insurance at Lloyd's, is entitled to have the policy in his broker's hands. Nor could the broker, in case of any damage arising, for want of a policy, or of a proper policy, through his default in not asking for it, or looking to see that it was in order, resist an action such as was brought by the employers in *Turpin v. Bilton*.¹

The statutes requiring contracts of marine insurance to be in writing, and stamped (35 Geo. 3, ch. 63, § 11; 54 Geo. 3, ch. 144, §§ 3, 4, 5), annul contracts not so framed, consequently, a marine policy, or contract for a marine policy, to be valid, must be in writing, which, by the assent of both parties, shall represent the contract between them. But for the decided cases, it might have been supposed that upon the slip being completed, there was a contract on the part of the assurers to prepare and hand over a policy according to the slip, and that although, because of the statutes, no action could be maintained as upon a policy of insurance, yet an action might be maintained for not preparing a policy. And causes have even been tried, without objection, upon the notion that the insurance is complete from the date of the slip.

But the law, as settled by the decisions upon the construction of the statutes referred to, is, that as there can be no valid insurance, or contract for an insurance, unless by writing with the statutory requisites, the slip by itself has no binding force. Thus, it has been held, that, notwithstanding the slip, the proposed assured, upon the one hand, can insist upon being off, and can retract his order, and refuse to accept the policy. *Warwick v. Slade*,² where the employer retracted the broker's authority after the slip was signed, though before the policy was completed; and, on the other hand, that the slip imposes no liability upon the proposed insurer, and there is no remedy against him until the policy is complete. *Parry v. The Great Ship Company*.³

It follows that the slip, though complete, is no contract, nor even part of a contract of insurance, but a mere proposal that a policy of insurance shall be entered into *in futuro*, and, in case of insurance with a company, a request that the policy shall be prepared at the office. Does it follow, that when a policy is prepared in alleged compliance with the request, it shall be, without more, the contract of both the parties? That cannot be the rule, because it must be open to the customer, or to his broker, when the negotiation takes place through a

¹ 5 Man. & G. 455.

² 3 Camp. 127.

³ 4 B. & S. 556.

broker, to object (and especially in the case of company policies, which do not always follow Lloyd's form), that the policy is wrong. In case of war, or a dangerous voyage, or, indeed, any case with a special provision, disputes may easily arise. In this very case a question might have been raised upon the omission of the running-down clause, which has been so commonly added in the margin since *Devaux v. Salvador*;¹ and see also *Taylor v. Dewar*.²

It is thus obvious that there must be power to object or refuse assent to the policy when prepared by the company; and, inasmuch as such objection or refusal touches the question, policy or no policy, it lies within the scope of the broker's authority. He may give a bad reason for his refusal, as the broker in the principal case is said to have done; but the badness of the reason assigned cannot take away from the effect of the act done, which, according to the maxim, must depend upon the power he had to do it, not upon the soundness of the reason he gave for doing it.

By way of removing this difficulty various suggestions have been made in argument. One was that the case is analogous to a conveyance of property, where assent is presumed until disclaimer. I am not aware, however, that this doctrine of presumed assent has ever been applied to the case of a mercantile contract, with something to be done on both sides, such as to insure upon terms which may or may not be correctly expressed, in consideration of being paid, or allowed to debit in account, a premium which may or may not be commensurate to the risk.

In the case of a simple benefit conferred, to be taken as it is, or not at all, like a bond or a release, there might be room for such a presumption, though it is difficult even there to recognize a complete contract before assent. But the presumption is out of place as applied to a contract with mutual obligations, which must be matter of bargain, and must be incomplete so long as either mind may dissent.

Indeed, the suggested analogy to conveyances of visible property, if it held good, would not help the plaintiffs, but rather tend to illustrate the necessity of subsequent assent. Thus, if B. order of a watchmaker a watch of the same make and materials as that of A., with B.'s name upon it, and the watchmaker makes it accordingly, intending it for B., and puts B.'s name upon it, so that it is as much as it can be the very watch bargained for; yet, without a new assent on B.'s part, it does not vest in him; the watchmaker cannot make B. take to it,

¹ 4 Ad. & E. 520.

² 5 B. & S. 58.

nor B. compel its delivery. See the argument in *Atkinson v. Bell*.¹

And, in like manner, as to a contract to be prepared *in futuro*, if goods are bought, to be paid for by the buyer's promissory note or check, payable to the seller or order, and the goods are delivered and accepted, and the buyer makes the note or check, and leaves it with his servant, to be handed to the seller when he calls for it, that transaction is not enough to vest the note or check in the seller, and the buyer may, without more, retake the note or check from his servant and put it into the fire.

It is clear, therefore, that the doctrine of presumed assent to a conveyance will not help, and that the mere previous request (even though binding as part of a contract), that a contract, which, to be valid, must be in writing, shall be prepared by one of the parties, proposing to contract, for the other, has not the effect of vesting a right in any contract in writing if and when so prepared, and much less can a previous colloquy, not binding as part of a contract, have that effect.

As another way of getting out of the difficulty, it was suggested to assume that the insurance company, or servants of the company, were made agents of the employers of the broker, for the purpose of assenting to the policy on their part. That would, however, be simply assuming the thing that is not, for the sake of shutting out an unpleasant consequence of the thing that is. To hold an auctioneer, or common broker, or other independent go-between, to be authorized to complete the contract for both buyer and seller, is but a necessary conclusion of fact from his being their common agent. To reason thus as to a clerk or servant of one of the parties, employed by him in a dependent capacity to attend to his business, involves a contradiction and has no foundation of fact.

These sources of light thus failing, let the transaction itself be examined with attention. It has been observed that the slip amounts only to a proposal that a policy shall be prepared upon certain terms. Those terms, so far as they are to bind the insurer, commonly include some known uniform ones, as to which there can be no question, but also others applying to the particular transaction, sometimes obscurely worded, sometimes imperfectly understood, and as to which disputes may arise. This consideration alone keeps the policy *in fieri* until objection is waived. On the other hand, the terms, so far as they are to bind the assured, include, besides the implied warranties, payment of premium, either in cash, or by being credited in account.

¹ 8 B. & C. 277.

If, then, the plaintiffs had ordered the policy without the intervention of a broker or his obtaining credit for himself, they could not have insisted upon receiving it without paying the company in cash. Had the directors offered them the policy, and had they refused to pay for it, they might have treated the negotiation as at an end, and cancelled the proposed policy. Had the loss happened before the plaintiffs called for the policy and paid the premium, the same result would follow, though the insurers might not choose to take advantage of a short delay. So much for a cash transaction.

If the directors agreed to insure against the plaintiffs' promissory note at a month, like considerations would arise. Had they in such case prepared the policy, and left it with their clerk, and the plaintiffs had drawn the note, and left it with their clerk, it is difficult to see why, without more, the policy should vest in the plaintiffs and not the note in the company, which, without more, it clearly would not.

In the principal case the directors were content to take the broker's credit instead of cash—that is to say, instead of stipulating for cash down they stipulated for the broker's allowing them to charge him in account with the premium; and this the broker, refusing to take to the policy, refused to allow them effectually to do, and so put the directors in the same position as if they had stipulated for cash, and cash had not been paid.

Some confusion has arisen from an attempt to deal with this case as if it had been that of an agent of a named principal, undoing, without authority, a contract which he had completely effected in pursuance of his authority. The case ought not to be so regarded. The broker was an agent to procure a policy in consideration of a payment to be made to him by his employers, with whom, directly, the defendant had nothing to do, he taking care that the policy was effected upon the given terms and upon his credit, the defendant looking to him for payment, and having no claim against his employers. Inasmuch, then, as the broker has to exercise a judgment upon the sufficiency of the policy, it was necessarily within the scope of his authority to reject that prepared as not being one or the one ordered. When he does so properly his employer gets the benefit; when he does so improperly his employer has his remedy by action against the broker. But the defendant, who dealt with the broker only, and stipulated for his taking to and being debited for such a policy, must, upon his rejecting it, and refusing to be debited in account with the premium thereupon, have an equal right to consider the negotiation at an end, and to cancel the proposed policy, as if cash had been stipulated for and refused.

The transaction cannot properly be split up into parts. It stands upon the same footing as if, upon one and the same occasion, the broker had ordered the policy at the respondent's office, and while he waited for it the seals had been affixed to a form of policy in another room, and before he received or assented to the policy he had said, "Stay ; I made a mistake. I decline to take up the policy, and you must not charge me in account with the premium." Whereupon the form was cancelled.

No subsequent protest by the principals that their agent ought to have acted otherwise can avail them. Their payment of the premium was not made to the insurers, but to their own ill-conducted broker, and their remedy must be against him. The defendant has not received, but has been refused, the premium ; and he was in no default, because he acted upon the refusal of the broker, to whom the whole business of effecting the policy was left.

The fallacy of the argument for the plaintiffs consists in separating the preparation of the policy from the rejection of it by the broker, and thus splitting up into several contracts, one of which is alleged to be authorized and the other not, what in reality, though distinct events in point of time, constituted together but one negotiation, which, by reason of the misconduct of the plaintiffs' agent, was abortive.

The question is thus answered in the negative.

LORD CHANCELLOR (LORD CHELMSFORD). My Lords, the difference of opinion which has prevailed among the learned judges in this case must necessarily diminish the confidence which I feel in the judgment I have formed upon it, more especially as that judgment is not in accordance with the views of the majority of the judges.

The question is one more of fact than of law ; and therefore, in considering it, it will be necessary to refer to the facts contained in the special case. [His Lordship stated them very fully.]

The usage with respect to premiums upon insurances effected by brokers is clearly explained by Lord Ellenborough in *Jenkins v. Power*,¹ and by Bayley, J., in *Power v. Butcher*.² The latter learned judge says :³ " According to the ordinary course of trade between the assured, the broker, and the underwriter, the assured do not, in the first instance, pay the premium to the broker, nor does the latter pay it to the underwriter. But, as between the assured and the underwriter, the premiums are considered as paid. The underwriter, to whom in most in-

¹ 9 M. & S. 232.

² 10 B. & C. 329.

³ *Ibid.* 339.

stances the assured are unknown, looks to the broker for payment, and he to the assured. The latter pay the premiums to the broker only, and he is a middleman between the assured and the underwriter."

The questions which arise out of the facts of the case are : First, whether there was a complete contract of insurance between the parties ; and, second, if there was a complete contract, whether it was afterward cancelled by the plaintiffs' authority.¹

Upon the first question we have no evidence of the fact of the execution of the policy, except that which arises upon the face of the instrument itself, and upon the facts stated in the special case that the policy (which must be taken to mean the executed policy) is kept by the company until sent for by the assured or his broker. The policy purports to be signed, sealed, and delivered by two of the directors of the company in the presence of Reginald Scaife, resident secretary. This statement on the face of the policy that all acts were done to render the execution complete, which is acknowledged by the directors who executed it, must, I think, be taken to be conclusive against the company, that it was not only signed and sealed, but also delivered. We all know the formal mode of executing a deed by the words, "I deliver this as my act and deed," a form which, no doubt, or something equivalent to it, was observed upon this occasion. The policy, most probably, was afterward given to the secretary to be kept till called for. Now, although the policy was thus retained by the officers of the company, when formal execution of it had taken place, they held it for the plaintiffs, whose property it became from that moment. It is a mistake to suppose, as some of the learned judges have done, that the policy wanted its complete binding effect till it was delivered to and accepted by Lascaridi. The usage of insurance companies, to keep the policy until sent for by the assured or his broker, is not for the purpose of completing the instrument by a delivery personally to the party or his agent, but merely as a matter of convenience. And as to Lascaridi's acquiescence and acceptance being necessary to complete the contract, I apprehend that there is no ground for such an opinion. He was the broker and agent to the plaintiffs, to effect an insurance upon their vessel upon certain terms dictated by them. He prepared the slip according to his directions. When the policy was executed, in exact conformity to his instructions, his duty was so far discharged ; and without the authority of the plaintiffs he could not refuse to accept it. They had effected, through their

¹ So much of the opinion as relates to this question has been omitted.—ED.

agent, a complete binding contract, which they alone could have a right to abandon.

I think that the judgment of the Exchequer Chamber was wrong and ought to be reversed, and that judgment should be entered for the plaintiffs.

LORD CRANWORTH. My Lords, my noble and learned friend has gone so fully into the facts of this case, that I shall not further advert to them, but shall assume that they are present to the minds of your Lordships.¹

There is no direct evidence as to what actually took place when the policy was, according to the practice (as stated in the language of the special case), filled up from the slip by the officers of the company; but as the policy purports to have been signed, sealed, and delivered by two directors of the company in the presence of the registrar, in pursuance of the powers and directions contained in the deed of settlement of the company, the fair inference is that this was the course prescribed by the deed, and that that course had been duly followed.

But, as to the effect of what was so done, the parties differ. The appellants contend that by thus signing, sealing, and delivering the policy, the directors made it an instrument thenceforth binding on the company. On the other hand, the respondent contends that until the policy was taken away by the assured or his broker, it did not become binding on the company. This latter view is that which has been taken by the great majority of the learned judges, and it is therefore not without some hesitation that I have arrived at a different conclusion, and that I concur with the opinions of the small majority of the judges who heard the case when it was argued at your Lordships' bar. I am of opinion that from the moment when the directors, acting, as I infer they did, in pursuance of the powers and duties conferred and imposed on them by the deed of settlement, executed the policy, it became absolutely binding on the company; and that it was not necessary, in order to give it binding efficacy, that it should be taken away by the appellant or his broker.

I come to this conclusion on the following grounds: In the first place, the efficacy of a deed depends on its being sealed and delivered by the maker of it; not on his ceasing to retain possession of it. This, as a general proposition of law, cannot be controverted. It is not affected by the circumstance that the maker may so deliver it as to suspend or qualify its binding effect. He may declare that it shall have no effect until a certain time has arrived, or till some condition has been per-

¹ A portion of the opinion has been omitted.—ED.

formed, but when the time has arrived, or the condition has been performed, the delivery becomes absolute, and the maker of the deed is absolutely bound by it, whether he has parted with the possession or not. Until the specified time has arrived, or the condition has been performed, the instrument is not a deed. It is a mere *escrow*.

If, therefore, the directors who executed this policy, delivered it only conditionally—*i.e.*, to take effect only when taken away by the appellants or their broker, then, as it was not so taken away, it never became operative. But I can discover nothing leading to the inference that there was any such condition attached to the delivery. The expression in the case that the policy is kept by the company until it is sent for by the assured or his broker, can only mean that this is the ordinary course of practice. But such a practice cannot, without more, have the effect of converting that which would otherwise be an absolute into a conditional delivery ; of converting delivery as a deed into delivery as an *escrow*. The practice referred to is, at least, as consistent with the hypothesis of delivery as a deed as of delivery as an *escrow*. A policy of this company can only be executed (as I presume) when certain of the directors and officers of the company are assembled ; and this explains why it is executed in the absence of the party assured. The practice assumes the previous assent on the part of the assured to the policy to be executed. It is not the practice that the assured should call for or examine the policy before he takes it away, but that he should send for it, evidently treating it as an instrument complete before it is taken away from the office. If, when it has been sent to him, he should discover that it is not conformable with the slip, his only remedy would be a remedy in equity to get it corrected according to the real meaning of the parties.

I know of nothing intermediate between a deed and an *escrow*. If the policy, when signed, sealed, and delivered by the directors, does not thereby immediately become the deed of the company, I do not see when and how it afterward acquires that character. The practice is, that it should be kept by the company till sent for by the assured or his broker ; not till the assured has had an opportunity of examining it, so as to ascertain that it is conformable to the slip.

It can hardly be argued that after the assured has sent for and obtained possession of it the company is not bound by it, even if it is not in conformity with the slip. Suppose the liability of the company, according to the slip, was to endure for a year, but that by the policy it is restricted to six months, the

assured on receiving the policy and discovering the error might well object, and insist on having a different policy ; but yet if a loss should happen within the six months, it surely cannot be doubted that the company would be liable on the policy actually executed. So if a loss should occur while the policy remains in the office, in consequence of the assured having carelessly forgotten to send for it. This can only be because it had been completely executed, though never seen and approved by the assured. And if executed, I am of opinion that it became complete when signed, sealed, and delivered. If the usage had been that it should, after being signed, sealed, and delivered, remain in the hands of the secretary till the assured or his broker had done some act signifying his approbation of it, that might have raised a question whether, until that approbation had been expressed, it was more than an *escrow*. But no such usage is stated. On the contrary, the thing sent for by the assured or his broker is, as I have already stated, clearly looked to as something complete before it is taken from the office, not as a document to be made perfect afterward by some act of the assured.

On these grounds I have come to the conclusion, after much consideration, that the three learned judges who were the majority giving their opinions to your Lordships were right ; and so, that judgment ought to be for the appellants.

Judgment reversed, and judgment given for the plaintiff.

GILBERT v. THE NORTH AMERICAN FIRE INSURANCE COMPANY.

IN THE SUPREME COURT OF JUDICATURE OF NEW YORK,
JANUARY TERM, 1840.

[*Reported in 23 Wendell 43.*]

THIS action was tried at the Oswego Circuit, in December, 1838, before the Hon. Philo Gridley, one of the circuit judges.

The defendants, on December 7th, 1836, entered into a policy of insurance against fire, to the amount of \$4000, upon a stone flouring mill, and a framed warehouse attached thereto, belonging to the plaintiff, situate at Oswego, for one year from the date of the policy. The mill took fire on October 23d,

1837, and was injured to a great amount. The first objection taken to a recovery was an alleged defect in the preliminary proofs. This objection was overruled by the circuit judge. The defendants next undertook to show that the plaintiff had, without their assent, parted with his interest in the premises insured ; and they accordingly produced in evidence a deed in fee, bearing date May 19th, 1837, whereby the plaintiff for the consideration of \$16,000, conveyed the property to one Jeremiah Nottingham.¹ The grantee in that deed being called by the plaintiff, testified that he entered into a contract with the plaintiff for the purchase of the premises ; that it was agreed that the plaintiff should execute a deed to him, and that he (the witness) should execute a mortgage back to secure the payment of \$11,000, and as to the residue of the purchase-money—viz., \$5000, that it should remain open until the close of a controversy between the plaintiff and one White, the grantor of the plaintiff, in respect to encumbrances charged upon the property ; that the deed and mortgage should be placed in the hands of Babcock, of Oswego, to be retained by him until the settlement of the controversy between the plaintiff and White, and then to be delivered over and take effect. The deed and mortgage were accordingly executed, and were both left in the hands of the witness to forward to Babcock. He subsequently explained that the understanding was, that the deed should be transmitted to the clerk's office of Oswego, to be recorded, and then handed over to Mr. Babcock, to remain until, etc. He accordingly sent the deed to the clerk's office, and the mortgage to Babcock, in whose hands both the deed and mortgage now remain ; the witness testifying that he had never accepted or received the deed. The deed and mortgage were recorded on the same day. The defendants also gave in evidence a deed of assignment, bearing date July 5th, 1837, executed by the plaintiff to one William P. Nottingham, in trust, for the payment of certain debts, whereby the plaintiff granted all his real estate, a schedule whereof was declared to be annexed. On production of the schedule it was manifest that the property at Oswego was not embraced in the assignment. Upon this evidence the counsel for the defendants moved for a nonsuit, which being refused, an exception was taken, and the jury, under the charge of the judge, found a verdict for the plaintiff. The defendants ask for a new trial.

IV. C. Noyes for the defendants.

W. Duer & B. Davis Noxon for the plaintiff.

¹ Only so much of the case is given as relates to this question.—ED.

BRONSON, J. III. The deed of May 19th, 1837, to Jeremiah Nottingham, presents a more important, though not a very difficult question. If the grantor do not intend that his deed shall take effect until some condition is performed, or the happening of some future event, he should either keep it himself or leave it with some third person as an *escrow*, to be delivered at the proper time. If he deliver it as his deed to the grantee, it will operate immediately, and without any reference to the performance of the condition, although such a result may be contrary to the express stipulation of the parties at the time of the delivery. This is one of the cases in which the law fails to give effect to the honest intention of the parties, for the reason that they have not adopted the proper legal means of accomplishing their object.

But this case does not come within the rule. There was no delivery of the deed, either upon condition or otherwise to the grantee. The agreement of the parties was, in substance, that the deed should be placed in the hands of Mr. Babcock, until the controversy with White should be settled, and then, and not before, the conveyances should be delivered. It was not necessary that the word *escrow* should be used in making this arrangement. The intention of the parties was sufficiently manifested without it. *Clark v. Gifford*, 10 Wendell, 310. If Babcock had been present, and the conveyances had been handed to him at that time, there would have been no question about it. And although absent, if the deed had been sent to him, with the proper instructions, by the hand of a third person, it could not be maintained that this would amount to a delivery to the grantee.

Now, what was done in this case? The deed, as well as the mortgage was left in the hands of Nottingham to be forwarded to Babcock, the depositary. It was not put into the hands of the grantee to keep, but merely as a mode of transmission to Babcock, as was well said by the judge on the trial. There was neither any formal delivery, nor any intent that the grantee should take it as the deed of the grantor. Nottingham received it, not as grantee, but as the agent of the grantor for a special purpose; and I see no good reason why he could not execute that trust as well as a stranger. He did execute it with fidelity, and the deed still remains with the depositary agreed on by the parties.

The fact that the deed had been recorded was only *prima facie* evidence of a delivery, which might be rebutted. *Jackson v. Perkins*, 2 Wendell, 308. What would have been the

consequence had Nottingham conveyed to a *bonâ fide* purchaser need not be considered on this occasion.¹

New trial denied.

¹ It has been held in one case that a deed may be delivered to the grantee for the purpose of transmission to a third person, to be held by him in *escrow* until the happening of some event when it should take effect as a conveyance, and that such delivery would not be absolute. *Gilbert v. N. A. Fire Ins. Co.*, 23 Wend. 43. In that case the grantee had deposited the deed with the third person in pursuance of the arrangement, the condition had not been performed, and the grantee made no claim under the deed. The case presented merely the question whether the grantor still retained an insurable interest in the premises described in the deed, the nominal grantee testifying to the terms in which the deed was delivered to him. Limited to its peculiar circumstances, no fault can be found with the decision; but if the grantee had retained the deed, claiming that its delivery to him was absolute, and in a contest between him and the grantor, parol proof of a conditional delivery had been offered, I think the result would have been different. If I am wrong in this conclusion the case discloses an avenue for the overthrow of titles by parol proof, which was supposed to be closed by the rule to which it would seem to form an exception. The reason given for the rule excluding parol evidence of a conditional delivery to the grantee applies to all cases where the delivery is designed to give effect to the deed, in any event, without the further act of the grantor. "When the words are contrary to the act, which is the delivery, the words are of none effect." (Co. Litt. 36a.) "Because then a bare averment, without any writing, would make void every deed." (Cro. Eliz. 884.) "If I seal my deed and deliver it to the party himself to whom it is made as an *escrow* upon certain conditions, etc., in this case let the form of the words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently." Shep. Touch. 59; *Whyddon's Case*, Cro. Eliz. 520; *Cruise's Dig. Title, 33, Deeds, ch. 2, § 80*. If a delivery to the grantee can be made subject to one parol condition, I see no ground of principle which can exclude any parol condition. The deed having been delivered to the grantee, I think the parol evidence that the delivery was conditional was properly excluded.

But there is also another ground on which the evidence was properly excluded. "It is essential to an *escrow* that it be delivered to a third person, to be by him delivered to the obligee or grantee, upon the happening of some event, or the performance of some condition from which time it becomes absolute." *James v. Vanderheyden*, 1 Paige, 238. By the agreement, as offered to be proved, the deed of Bingham to Braman was to be held as an *escrow* until Braman's return, "and then to be given up to Bingham." A deed thus delivered is not an *escrow*, although the parties may call it such, because there is no event in which it is to be delivered to the grantee. A deed so delivered, if not so intended, when deposited, to operate as a deed *in presenti*, could never have any validity without a new agreement of the parties. *James v. Vanderheyden, supra*. If there were nothing in the case to aid in ascertaining the intention of the parties in making the delivery, beyond the parol proof which was offered, the deed would be held absolute on account of its delivery to the grantee, or it would be held void for want of any delivery; it could not be treated as an *escrow*.—Selden, J., *Braman v. Bingham*, 26 N. Y. 483, 491-493.—Ed.

ORDINARY OF THE STATE OF NEW JERSEY *v.*
ROBERT THATCHER AND OTHERS.IN THE SUPREME COURT OF JUDICATURE OF NEW JERSEY,
NOVEMBER TERM, 1879.*[Reported in 41 New Jersey Law Reports 403.]*

SUIT in the Hunterdon Circuit on a guardian's bond. Under the direction of the Court a special verdict was rendered. The facts found are sufficiently stated in the opinion.

Argued at June Term, 1879, before Beasley, C.J., and Darrimple and Woodhull, JJ.

J. N. Voorhees for the plaintiff.

John T. Bird for the defendants.

The opinion of the Court was delivered by

BEASLEY, C.J. The first subject of inquiry in this case is, whether a guardian's bond, given in the common form to the Ordinary, can be delivered in *escrow* to the surrogate of a county? The proposition is stated intentionally in this general form, so as to separate the question, for the purposes of the research, from the specialties of this particular case, and which specialties will be considered in another aspect of the discussion.

It has been frequently decided that a deed may be delivered in *escrow* to a co-obligor, even though such obligor be the principal bondsman. Such were the judgments in the leading cases in this State of *State Bank v. Evans*, 3 Green, 155, and of *Black v. Lamb*, 1 Beasley, 108; 2 Beasley, 455. In both of these instances the deed in question respectively was delivered conditionally to one of the co-obligors, and in each case the instrument was regarded as having been well delivered in *escrow*. This same doctrine is maintained by such a multitude of authorities that it seems hardly open to controversy anywhere, and it certainly is at rest so far as concerns our own tribunals. It might, however, tend to misconception if this general statement of the legal rule should not be qualified by an intimation that there may be cases in which an obligor may, by his incaution, impart to the depositary of the instrument delivered in *escrow* such an apparent right to pass it away in an unqualified form to the obligee, as to prevent such obligor from setting up the existence of a condition that was to have been complied with before such instrument became deliverable. This restrictive rule has been sanctioned by a number of the courts of this country, and has recently been enforced by the Supreme Court

of the United States in the case of *Dair v. United States*, 16 Wall. 1, in which a bond perfect on its face had been executed by sureties and by them delivered in *escrow* to the principal obligor, and who had passed it over in the ordinary course to the government ; the attempted defence was that the instrument had been placed with the principal obligor as an *escrow*, and had been delivered by him in violation of the condition imposed ; but the Court adjudged that as the principal obligor had been clothed with an apparent right to transfer the bond without qualification, and as the officer of the government receiving it, no matter how vigilant, would be unavoidably deceived by such conduct, the defence could not prevail. The decisions in the cases of *State v. Peck*, 53 Maine, 284 ; *State v. Pepper*, 31 Indiana, 76, and *Millett v. Parker*, 2 Metc. (Ky.) 608, are to the same effect.

From this explication it will be noted that the cases in this train proceed on the ground, not of a denial that a deed may be delivered by a surety in *escrow* to the principal obligor, but that an estoppel *in pais* may arise from the position of the circumstances ; the consequence therefore is, that the principle thus introduced does not obtain unless the recipient of the bond is so situated as almost unavoidably to be misled, by the appearance of things, into the belief that the obligor in making delivery has the legal power to do such act. If there is in the affair anything to put him on his guard, as, for example, the indications on the face of such a bond as is now under consideration, which has not been executed by all the persons named in its body as obligors, the rule does not become applicable. Inasmuch, however, as the bond in the present case was not delivered by the sureties through any intermediate agency, but by their own hands, this doctrine of estoppel is not pertinent, and was alluded to only to avoid mistake with respect to the extent of the general rule that the co-obligor may hold the deed in *escrow* in behalf of the sureties.

As the surrogate received this bond from the sureties themselves, the only inquiry under the present head is, as to the legal status of that officer in an affair of this kind. Does he stand sufficiently aside of the obligation, so as to be capable of taking, for the benefit of the sureties, the bond in *escrow* ; or does he, in its reception, represent, *simpliciter*, the obligee ? Can this officer in such a matter be the agent of the surety, as well as the agent of the surrogate-general ?

My consideration of the subject has led me to the conclusion that the county surrogate is in this respect the agent of the Ordinary alone, who is the obligee in the instrument. The

procedure comprising the making of these bonds is this : a petition is presented to the Orphans' Court, praying for the appointment of a person nominated as guardian, and offering to have executed a bond with certain named sureties ; the Court assenting, a bond is prepared and given to the surrogate, who presents it to the Court for approval, and, upon being passed, files it in his office. In form, the bond is between the guardian and his sureties of the one part, and the Ordinary, or surrogate-general, of the other.

It is thus evident that unless the tradition of these bonds to the county surrogate be a tradition in law to the surrogate-general, they are not, in point of fact, passed to him at all. It seems to me, therefore, that the county surrogate is, in this matter, the representative of his superior officer, and that therein his entire function consists in a right to accept a delivery of the bond. He has no authority to do more than this ; he is not empowered to make any terms, or to assent to any conditions, in behalf of his principal ; and being a public officer, the extent of his ability is known to all persons dealing with him. The receipt of the bond on the part of the surrogate is a mere ministerial act, and in doing it he is the deputy of the Ordinary. It is, too, an official act, and, being a public officer, he cannot in such a transaction be the agent of an individual. In short, in my judgment, the surrogate-general receives this bond from these obligors by the hand of his subordinate, and, in point of law, the transaction consists of a delivery of the instrument to the obligee.

This being the situation, I think it follows unavoidably that this defence is invalid, for a deed cannot be delivered in *escrow* to the grantee or obligee. Authorities may be found that deny, or question, this proposition, but I see not the least ground for saying that it has not always been one of the admitted canons of the common law. I am not aware that any English judge has ever doubted the prevalence of the rule. The doctrine is stated as established law, both in the Touchstone and in the Institutes of Lord Coke. In the former of these authoritative works the principle is stated in these plain words : " The delivery of a deed as an *escrow* is said to be where one doth make and seal a deed and deliver it unto a stranger until certain conditions be performed, and then to be delivered to him to whom the deed is made, to take effect as his deed." And, again, in a subsequent passage, this master of the common law says : " So it must be delivered to a stranger ; for if I seal my deed and deliver it to the party himself, to whom it is made as an *escrow* upon certain conditions, etc., in this case let the form of the

words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently, and the party is not bound to perform the conditions ; for *in traditionibus chartarum non quod dictum, sed quod factum, est inspicitur.*" Shep. Touch. 58, 59. And prior to this authority we find the same doctrine stated as settled law in the treatise of Perkins (p. 61), which Lord Coke, in the preface to Volume X. of his reports, tells us was "wittily and learnedly composed and published" in the reign of Edward VI. There are also a number of references to the doctrine in the Year Books. 14 Hen. VIII., p. 28 ; 18 Hen. VI., p. 42. And the following references will serve to show how extensively the existence of this legal rule has been recognized both by the English and American courts : Co. Litt. 36 ; Thorougheed's Case, 9 Rep. 137 ; Whyddon's Case, Cro. Eliz. 520 ; Blunden *v.* Wood, Cro. Jac. 85 ; Holford *v.* Parker, Hob. 246 ; Bushell *v.* Pasmore, 6 Mod. 218 ; T. Moore, 642 ; Foley *v.* Cowgill, 5 Blackf. 18 ; Gilbert *v.* N. Amer. Ins. Co., 23 Wend. 43 ; Den *v.* Partee, 2 Dev. & Bat. 530 ; Simonton's Estate, 4 Watts, 180 ; State Bank *v.* Chetwood, 3 Halst. 1.

With respect to the authorities cited in the well-considered and learned brief of the counsel of the defendants, it is to be observed that most of them relate to cases in which the impeached instrument had been delivered on condition to a co-obligor or to a third party ; and it will be found that in most of these decisions it is incidentally admitted that such a delivery cannot be made to an obligee. An exception to such current of authority is certainly to be found in the remarks of Campbell, J., in the case of *People v. Bostwick*, 32 N. Y. 445, to the effect that the rule that a deed cannot be delivered as an *escrow* to the party who takes the interest under it, has application only to the case of a deed of conveyance, and that it is such a deed alone that cannot be delivered to the grantee on condition, the reason being that in such case the estate vests, "which cannot be divested except by due process of law or by the voluntary execution of a deed by the grantee ;" but there seems to be no reason to believe that this novel view was the ground on which the decision of the Court was rested, for Denio, C.J., in the expression of his conclusions, without noticing the theory of his learned colleague, adheres to the accepted doctrine, and says, "certain principles are very well established ; where a deed is delivered to a party who is the obligee or covenantee, it is impossible to annex a condition to such delivery." Nor is it easy to understand why the grantee in a deed cannot receive such deed in *escrow*, if he can hold a bond under such circumstances, because, granting the capacity to become the deposi-

tary of an *escrow*, it seems clear that by the conditional delivery of a conveyance to him the estate would not vest until the performance of the condition, any more than it would if such delivery were to a third person. But, independent of such considerations, it seems to me quite out of the question, at this late day, to sanction a suggestion that stands in opposition to so much authority from the epoch of the Year Books to the present time.

I conclude, then, under this first head, that the deed in question was delivered, in legal contemplation, to the obligee in person, and that, consequently, it was not possible to attach any condition to such an act. Nor do I think that in answer to this it will suffice to urge, as is urged, that the delivery was not complete, because such a contention is obviously in the face of the facts. These sureties left this instrument in a completed form, so far as they themselves were concerned, with the surrogate, and they were to do no other act in regard to it; and, consequently, if the deed was not then delivered by them, they had no intention to deliver it. The true theory is, that a deed is delivered whenever it is intended that it shall go into effect by virtue of such delivery, without further act on the part of the party making the transfer. For the purpose of this part of the inquisition, I assume that these sureties delivered this instrument to the surrogate, intending to deliver it, as they say, as an *escrow*, and using words expressive of such purpose; and from these premises I have concluded that the bond, by force of an imperative rule of law, passed to the obligee, detached from all extraneous conditions. The bond cannot, notwithstanding such expressed conditions, be treated as an *escrow* in the hands of such obligee.

In order to estimate fully the force of this position, it is necessary to bear in mind that the deed in question was, with respect to its legal effect, a perfect deed, so far forth as the defendants were concerned. The deed, it is true, nominated in its premises another person as an obligor, besides the parties signing in that capacity, but this did not make it less the finished act of those who did execute it. No one will pretend that if the signers of this deed had delivered it to the surrogate in its present state, without annexing any condition to its tradition, that it would not have been binding in law. The decisions are uniform and numerous to that effect. The fact of the absence of the signature of a party named has no legal significance, except that it may, as a circumstance, tend to confirm, in a proper case, the contention that the deed was delivered in *escrow*, or may serve to put an obligee on his guard

when he receives the instrument from the hands of the principal obligor, or of a third party, as to the authority of such agent to make delivery to him. In all other respects, the fact that the deed has not been signed by some of the persons named in it as obligors cannot impair the obligatory force of the specialty with regard to the persons executing it.

Before leaving the subject, I also remark that the rule which is above applied in this case is not, in my judgment, by any means a merely technical one. To the contrary, I regard it as a wise regulation, founded in public utility, and conducing greatly to the security of persons desirous of executing contracts in a definite and assured form. The law reasonably provides that the instrument delivered shall be conclusive, with respect to its contents, as to the intention of the parties to it; and in the same manner, and in view of the same considerations, the act of delivering the instrument should be equally conclusive. The danger to be apprehended from fraud and false swearing, as well as from the infirmity of human memory, would be as great in the one case as in the other. If a condition could be annexed to a delivery of a deed when made to the obligee himself, the very essence of the transaction would be left to depend on the memory and truth of the bystanders. I cannot but think that there is manifest wisdom in the old rule, that the law will regard in such transactions not what is said but what is done. Nor does it seem to me that such rule is ever, in any of its manifold applications, of more worth than when it is employed as a safeguard to persons who are of necessity represented by public officers. It must strike every one as a most alarming idea, that any of the numerous bonds that are given to surrogates and clerks can be defeated if it can be made to appear, by parol, that any of the parties executing and delivering such instruments stated to such officers receiving it that it was to be inefficacious unless upon the happening of some event. This present case would afford a fair illustration of the practical operation of such a pernicious principle. These parties themselves delivered this instrument into the hands of the surrogate, as a security of the estate of this infant; the surrogate, after it had been duly approved by the Court, filed it in his office; and now after the lapse of many years, when it becomes necessary to resort to it, the property of the minor having been wasted by the guardian, the endeavor is to explode the entire transaction by showing, by the oaths of the parties interested, that the instrument is a nullity, as it was delivered, subject to a condition that has not been fulfilled. In my judgment, law and public policy are in accord

on this subject, both declaring that such a defence cannot prevail.

There is a second aspect of this case, but which also appears to me equally unfavorable to the pretensions of these defendants, for, on the assumption of the capability of the surrogate to receive a bond in *escrow*, I think it plain that the legal inference from the facts found by this special verdict must be that no such delivery was, in point of fact, made.

In disposing of this point, I premise that I admit, to its full extent, the rule of exposition that was adopted in the case of *Evans v. State Bank*, and which was reiterated in *Lamb v. Shreve*, that the question whether any given delivery is conditional or not, is to be decided, not, as was at one time supposed, by a mere form of words or turn of expression, but from the intention of the parties, as manifested by their language and acts. As Sugden, C., said, in the case of *Nash v. Flyn*, 1 Jones & La Touche, 162, "now it is quite settled that it is not necessary, in delivering an instrument as an *escrow*, to say that it is delivered as an *escrow*. I have always considered it as a clear point, that if the instrument be delivered upon condition, that constitutes an *escrow*." This is undoubtedly the reasonable and modern rule of construction applicable to these transactions. Nevertheless, in handling this question at the present time, there are two considerations which we must carry with us, the first being that we have to do with a special verdict, and, in the second place, that we must find, in order to make the defence available, that the delivery was conditioned with a stipulation that the instrument should not go into effect unless a certain act should be performed.

This verdict has not found the point, that the transfer of the deed was subject to any terms; all that it does is to ascertain certain facts, and the inquiry, therefore, is as to the legal value and effect of such facts. In the exposition of findings of this character, the rule is that when the facts found are of such a nature that clear conclusions can be drawn from them, it is no objection to the finding that the jurors themselves have not drawn such conclusions and stated them as facts. This is the theory denoted by Dallas, C.J., in *Monkhouse v. Hay*, 8 Price, 256, and is in accordance with the practice in such cases as appears from Mr. Tidd's Manual, p. 897. If the circumstances presented have so uncertain a tendency as to leave the mind in doubt as to their legal effect, then indeed the Court cannot make any deduction. Bearing in mind, then, the twofold office to be performed—viz., that a conditional delivery must be found, and that only necessary conclusions are to be deduced from

established facts, I will turn to the merits of this case as they are spread upon this record.¹

Now this testimony, as I construe it, shows this and nothing more, that both these sureties who signed this bond believed that it would be signed by the third surety, and they had the promise of the principal obligor that he would procure the signature of such third surety. But such belief, founded on such promise, does not manifest or constitute a conditional delivery of the instrument. Neither of these sureties intimated by word or act that in case of the failure of the other party to sign, the bond was to be inefficacious with respect to himself. Whether either of them would have said so if the question had been propounded at the time, is a matter left in the utmost uncertainty. Now each says, and no doubt is fully convinced, that he would not have agreed to execute the obligation without this third party assuming a share of the risk ; but who can say confidently that such was his opinion or intention at the time of the transaction ? And even if we were satisfied that such at the time was their intention, we must remember that the existence of such intention alone would not absolve them from this obligation, for it must also appear that such intention was manifested to the officer receiving the bond. Was the surrogate then given to understand that unless the third signature was obtained the bond was to be a nullity ? In order to conceive clearly the point of inquiry, it is necessary to bear in mind that a promise of the principal obligor to do some act in the future as an inducement to the surety to sign, and the non-fulfilment of such promise, will not in the least degree impair the validity of the obligation delivered in reliance on such promise. To have such effect it is requisite that it should be stipulated that the bond is not to come into existence as an obligation until the performance of such promise. The correct doctrine on this subject is stated perspicuously by the Court in the case of *Evans v. Gibbs*, 6 Humph. 405, in these words : " It is incumbent on him who alleges it [the deed] to be an *escrow* merely, and not his deed, to prove affirmatively, not that the principal promised something further should be done, by way of inducement to his execution of the instrument, but that the performance of such further act was the condition upon which he was to become bound, or the instrument to be delivered as his act and deed." In the case in hand, the principal obligor promised the sureties to bring in the third bondsman to sign, but plainly neither of such executing sureties made the performance of that promise the condition on which he was to become bound. To the same

¹ The recital of facts has been omitted.—ED.

purpose is the case of *Cumberlege v. Lawson*, 40 E. L. & Eq. 228, in which the defendant pleaded that "he executed the indenture on the faith that P. (one of the sureties) should join therein, and who never did execute it;" the Court holding the plea bad, *Cresswell, J.*, saying: "The defendant does not say that he never did seal and deliver; nor that he delivered the deed as an *escrow*, on condition that P. should execute it." And in *Bowker v. Burdekin*, 11 M. & W. 127, it is similarly obvious that the deed was executed under the influence of the same kind of inducement, because in that case the deed of assignment, in its body, purported to be the deed of three members of a firm, and to convey all their personal estate in trust for creditors; but the contention that the instrument was delivered as an *escrow* was rejected, *Parke, B.*, remarking: "It seems probable the partners contemplated that the other partners should execute the deed, but, in the mean time, this party has set his seal and delivered the deed as an instrument which conveys all the property he has." That the mere expectation, or well-founded belief of the party signing, that another party will sign, will not make a delivery by the former conditional on an execution by the latter, appears also from that numerous line of cases in which deeds have been pronounced valid which, upon their face, manifest that it was expected that other parties should sign. *Duncan v. United States*, 7 Pet. 435, and *Cutter v. Whittemore*, 10 Mass. 442, are leading cases of that class, and they are founded on the radical distinction which exists between an understanding, contemporaneous with the delivery of a deed, that something further is to be done as a part of the transaction, and an understanding that the doing of such thing is to be a prerequisite to the legal existence of the instrument. *Williamson, C.*, has clearly discriminated in this respect, in the opinion read by him in the case of *Black v. Lamb*, 1 Beas. 118, where he says: "There is a manifest difference where the testimony is offered for the purpose of showing that the writing was not to be delivered until a condition precedent was performed, and that it was delivered with an agreement that the condition was to be performed." In the present case, as presented in this record, I can find no facts from which, as a matter of reasonable certainty, an inference can be drawn that there was an understanding that the present bond should have no legal effect until the signature of the third surety should have been obtained. Nor can I think that, in transactions of this kind, if it is to be held that the surrogate can stand as the depository of an *escrow*, the law should be satisfied with anything short of the most convincing proof that the transfer of the instrument to the

official hand was conditional. It is easy for the party to speak plainly on the subject, if such is his intention, and in an affair involving the estates of persons who, from the immaturity of their minds, are incapable of taking care of their own concerns, he is bound to do so. The passing of an instrument into the possession of the party taking an interest under it, is an act so significant of the right of such recipient to take and enforce it according to its terms, that to control such manifestation, circumstances or expressions amounting almost to demonstration should, in my opinion, in all cases be exacted. There is no reason to believe that if, in the present instance, these defendants had in any intelligible manner intimated to the surrogate that they were not to be bound by this bond until it was executed by the other surety, that it would ever have been made use of or tendered for judicial sanction. The consequence is, that if the matter is left in doubt as to the character of the delivery of this instrument, such doubt should be resolved in favor of the innocent person, to secure whom the bond was given, rather than to the advantage of these defendants, whose carelessness has at all events produced the situation.

The cases cited in the brief of the counsel for the defence have been carefully examined and considered, but most of them appear not to be upon the point where the stress of the case lies, for they relate to the effect of deeds left in the hands of a co-obligor, or of a third party, to be vitalized on the performance of a condition clearly expressed. *Pawling v. United States*, 4 Cranch, 219; *Ward v. Churn*, 18 Grattan, 801, and a large number of others, which are referred to, do not differ in any material degree from that of *Evans v. State Bank*, which rests upon incontestable law. The decision in *Fletcher v. Leight*, 4 Bush (Ky.), 303, is nothing but the exposition of a local statute, and *Clements v. Cassilly*, 4 La. An. 380, is an offshoot of the civil and not of the common law. The case of *Sharp v. United States*, 4 Watts, 21, is more pertinent, but appears to have been decided upon little consideration, as none of the authorities are referred to, and the decision is put upon a principle that is inconsistent with almost all the authorities upon this subject. With respect to the case of *Evans v. Bremridge*, 8 De G., M. & G. 100, which seems to have been much relied on, as it is referred to several times, it is a judgment plainly adverse to the defence, as the instrument then in question was admitted to be good at law, as appears by the report of the case in 2 Kay & Johns. 174, where Wood, V.C., is recorded as saying: "So here the deed is good at law. Not having delivered the deed upon condition of its being executed by the co-surety,

the plaintiff is bound at law to pay the amount ; but the question is, What is its effect in equity ?" It is true that in that case, which arose on a bill in chancery, relief was afforded founded on grounds that do not seem to be present on this occasion ; but with such equities, it is obvious, at this time we have no concern.

With respect also to the fact adverted to by counsel, that this bond was executed in view of the order of the Orphans' Court sanctioning a bond by three named sureties, it does not appear to me to be a circumstance having any legal force. The Court certainly, by reason of such direction, was not precluded from changing its purpose, or from accepting a bond signed by a lesser number of sureties ; nor could the existence of such original order qualify in any measure the act of these defendants in making delivery of this instrument ; such order, as part of the transaction, may indeed tend to show what they expected would be done, but it does not help to explain what in point of fact they themselves did.

I think the plaintiff is entitled to judgment on this special verdict.

ALFRED BLEWITT, APPELLANT, *v.* WILLIAM B.
BOORUM ET AL., RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, MAY 1, 1894.

[*Reported in 142 New York Reports 357.*]

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made April 6th, 1891, which affirmed a judgment in favor of defendants entered upon a decision of the Court on trial at Special Term dismissing the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Isaac N. Miller for appellant.

James L. Bishop for respondent.

PECKHAM, J. This action was brought to obtain an accounting from defendants and for damages sustained by plaintiff by reason of the violation of a certain contract, under seal, entered into between the parties to the action in relation to the right to manufacture and sell a temporary kind of binder for books, called the "Common Sense Binder," and for which letters patent had been issued.

The defendants admitted the execution of the contract, but alleged that it had been executed upon the parol condition that it was not to operate as a contract until the plaintiff acquired the interest of a third person in the patent spoken of in the agreement, and it was alleged that the plaintiff had never performed the condition. Evidence showing that the contract was executed with the condition above stated, and that the condition had never been performed, was offered upon the trial and received by the Court, under proper objection and exception on the part of the plaintiff, and, after the evidence was in, the Court found the fact in accordance with defendants' contention and gave judgment dismissing the complaint, which was affirmed at the General Term, and from such affirmance the plaintiff has appealed to this Court.

The case of *Reynolds v. Robinson*, 110 N. Y. 654, holds that a writing which is in form a complete contract, and which has been delivered, may be proved to have been delivered upon a parol condition that it was not to become a binding contract until the happening of some event in the future, and that such event had not occurred. The cases cited in the brief opinion fully bear out the statement.

The plaintiff here contends that the authority of that case must be confined to contracts which are not under seal, and, as the contract here was a sealed one, the case has no application.

Of course the mere presence or absence of a seal upon a writing would seem to be a matter of the smallest importance upon the question now under consideration. The same reasons would apply with equal force for receiving or rejecting the contemporaneous parol understanding where the writing was sealed, as where the seal was absent. It is a question in each case as to whether there has or has not been an executed and completed agreement or act. Many of the old English cases held the doctrine that where there was a writing bearing upon its face the marks that it was fully and completely executed, if there were a delivery of the writing to the party himself, there could be no parol evidence that the delivery was upon a condition or in *escrow*. The reason assigned in many cases was that such evidence would lead to the result that a bare averment without any writing would make void every deed. The word deed was not used in its restricted sense of a written instrument conveying land, or some interest therein, but in the sense that it was a writing of the party, and hence his act or deed. In *Williams v. Green*, 1 Croke's Eliz. 884, the action was one of debt on a bill. There was no seal attached. The plea was that the bill had been delivered to the plaintiff as a schedule

(a memorandum), upon condition that if plaintiff delivered to defendant a horse upon a certain day, then the schedule was to be his deed, otherwise not, and that plaintiff had not delivered the horse. The plaintiff demurred to the plea, and it was resolved by the whole Court to be a bad plea, for a deed could not be delivered to the party himself as an *escrow*, because then a bare averment without any writing would make void any deed. The decision was not based upon the question of a seal, and the paper was referred to as a deed simply by way of description of an act of the party in delivering a written instrument which ought not to be rendered void by a parol contemporaneous understanding or agreement. The reason would apply with equal force to all written instruments, sealed or unsealed. Other cases of a nature where the writings needed not to have been under seal, and where it was held that they could not be delivered conditionally to the party to the instrument, are cited in 2 Coke upon Lyttleton, 276 (Philadelphia ed., 1827; 1st Am. from last London ed.). On the other hand, there is one case which decided that a writing obligatory could be delivered in *escrow* to the obligee (*Hawksland v. Catchel*, 1 Croke Eliz. 835), but after differences of opinion among the judges it was finally resolved otherwise in later cases, as stated in Coke (*supra*).

These cases show that the rule preventing parol evidence of a delivery to the party upon condition, was not founded upon the presence of a seal to the writing, but the rule was adopted because when the words were contrary to the act (of delivery), the words were regarded as of no effect, for it was not what was said, but what was done, that was in such case to be regarded. Hence, a delivery to a party was said to be inconsistent with any condition attached to it, and a condition was, in fact, a contradiction of the writing, and parol evidence of the condition was, therefore, inadmissible. A different view was subsequently taken of this act of delivery. The courts said it was not a contradiction of the terms or legal effect of the writing, but it was proof simply that no contract had, in fact, been entered into. They said that the production of a writing purporting to be an agreement by a party, with his signature attached, afforded a strong presumption that it was his written agreement, but if at the time the parties agreed that the writing was not to take effect as an agreement until the happening of some event, in other words, that it was agreed upon conditionally, then it should not take effect until the happening of the event or the fulfilment of the condition. *Pym v. Campbell*, 6 Ellis & Black, 370; S. C., 88 Eng. Com. L. 370. *Crompton*

ton, J., in the above case, in speaking of an instrument under seal, said it could not be a deed until there was a delivery, and when there was a delivery that estops the parties to the deed, which was a technical reason why a deed could not be delivered as an *escrow* to the other party. He said the parties may not vary a written agreement, but they may show that they never came to an agreement at all, and that the signed paper was never intended to be the record of the terms of the agreement, for they never had agreeing minds. In truth, however, the Court of Exchequer in *Bowker v. Burdekin*, 11 M. & W. 128, had already distinctly stated that a delivery of a deed to a party might be in *escrow*, even though the condition were not in express words, if from the circumstances attending its execution it could be inferred that it was not delivered to take effect as a deed until a certain condition were performed. Parke, B., said in that case it was now settled law, though it was otherwise in ancient times, that in order to constitute the delivery of a writing as an *escrow*, it was not necessary that it should be done by express words, but you are to look at all the facts attending the execution, and though in form it was an absolute delivery, if it can be reasonably inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will still operate as an *escrow*. The deed was in that case delivered to the party who was to take a benefit under it, and while the Court held it was, in fact, an absolute delivery, the learned judges admitted that it might have been delivered conditionally to a party, and, if so, it would not take effect until condition performed. And in *Gudgen v. Besset*, 6 Ellis & Bl. 986, the lease of premises for a term of years was signed, sealed, and delivered to the party, although after such delivery the grantor retained the lease in his possession. The agreement was that it was not to take effect until lessee paid £100, £50 only being then paid. The Court from all the facts in the case held that the clear inference was that the instrument should not operate as a lease until full payment, and if there were such an agreement, though no express words of delivery as an *escrow* were used, it would not operate as a deed until payment was made, and consequently the lessee, although in possession of the premises, was tenant only from year to year, and not tenant under the deed, Campbell, C.J., holding that the formality of delivering the instrument to a third person as an *escrow* was not essential when it was intended to operate as such. Looking at all the facts the learned judge said it must have been the intention of the parties that the instrument should not operate as a lease till the money was paid, and that neither

party intended that the interest in the term should vest till then.

As a result of the examination of the English authorities I think it is clear that the presence of a seal on a writing was not the reason for prohibiting parol evidence of a condition attached to a delivery to a party, but that where parol evidence was disallowed it was on the theory that otherwise it would be contradicting the writing. The rule was overthrown in England by the cases cited, which permit parol evidence that the delivery of a writing, although under seal, may be shown to have been under an agreement that it was not to operate as such until the happening of some future event.

In this State in *Lovett v. Adams*, 3 Wend. 380, it was said by Savage, C.J., that if a bond be signed and put into the hands of the obligee or a third person on the condition that it shall become obligatory upon the performance of some act of the obligee or any other person, the paper signed does not become the bond of the party signing the same until the condition precedent shall be performed. Until then there is no contract. The Court held that evidence of such facts should have been admitted. So the presence of a seal was considered no obstacle to parol proof that the writing was delivered to a party to the instrument upon a condition which had not been performed. The rule in this State regarding deeds conveying real estate, or an interest therein, or agreements for the sale thereof, is that a delivery cannot be made to the grantee or other party thereto conditionally or as is said in *escrow*, and when delivered to a party the delivery operates at once and the condition is unavailable. *Gilbert v. The North American Fire Ins. Co.*, 23 Wend. 43; *Worrall v. Munn*, 5 N. Y. 229; *Braman v. Bingham*, 26 N. Y. 483; *Wallace v. Berdell*, 97 N. Y. 13, 25.

Whether there is any sound basis for a distinction between cases relating to real estate and other kinds of written instruments, it is not now important to inquire, for the rule that instruments of the former character cannot be conditionally delivered to a party is too firmly established in this State to be overruled or even questioned. In the case in 23d Wend. (*supra*) *Bronson, J.*, says it is one of the cases in which the law fails to give effect to the honest intention of the parties, for the reason that they have not adopted the proper legal means of accomplishing their object. In *Arnold v. Patrick*, 6 Pai. 315, the writing involved was a deed of land, and the remark of the chancellor, that the rule applied to any sealed instrument, was beyond the question. He refers as authority for his statement to *Thoroughgood's Case*, 9 Coke, 137*a*,

reported in Vol. V., at p. 241 of the London ed. of Coke's Reports, 1826.

The writing in that case was a deed conveying lands, but cases are referred to in the report where bonds were thus delivered, and it was held that no condition could be attached to a delivery to a party. I have already stated, in reviewing the English cases, that the rule was not founded upon the presence of a seal, but because the delivery could not be contradicted by parol evidence of a condition attached thereto. Those old English cases have been passed over and substantially overruled by the English courts, so far as to hold that the delivery even of a sealed instrument to a party could be made conditionally. And the case in 3d Wend. (*supra*) shows that a bond could be delivered conditionally to a party.

In *Cocks v. Barker*, 49 N. Y. 107, parol evidence was admitted to show that the bond was delivered conditionally, and the trial court found against that fact. In this Court it was stated that the evidence was not admissible, because a deed could not be delivered to a party upon condition, citing *Worrall v. Munn* and *Gilbert v. Ins. Co.* (*supra*). It was not necessary to the decision, and I think the doctrine that a bond could not thus be delivered is not borne out by the cases in this State, and certainly not by the later cases in England already cited.

But a bond imports the existence of a seal, and the latter is requisite to the legal existence of a bond.

The instrument in this case was an ordinary agreement, not requiring a seal for its validity, and we think the rule as to sealed instruments, however far it may be carried in regard to such instruments as require a seal for their validity, should not be extended in any event to those cases where the instrument is in law not in the nature of a specialty, and where the presence of a seal is totally unnecessary to its validity.

I think myself the rule should not extend beyond what seems to be the settled law in this State in regard to deeds or writings conveying or relating to the conveyance of real estate, or some interest therein, but in this case it is not necessary to now go further than to hold the rule inapplicable to an instrument not in any way relating to or affecting real estate, and which does not require a seal for its validity, the seal being in such case and for this purpose regarded as surplusage, and the instrument should be held to come within the rule laid down in *Reynolds v. Robinson*, 110 N. Y. 654, already cited.

The other cases cited in plaintiff's brief have been examined. With the exception of *Van Bokkelen v. Taylor*, 62 N. Y. 105, they hold simply that parol evidence of a contemporaneous

parol agreement, outside of and varying the terms of a written contract, is not admissible. We do not hold the contrary, but simply hold the parol evidence of an agreement that the writing should not take effect upon delivery until the happening of some condition is admissible in such a case as this. *Van Bokkelen v. Taylor* (*supra*) was a case of a composition release by creditors of a common debtor, and it was held that evidence of a secret condition attached to the execution or delivery of the release by one of the creditors was inadmissible, as such an agreement in regard to a composition release was void in any event. The case does not touch the question here involved.

We have looked through the other exceptions set forth in this record, and find none that calls upon us to reverse the judgment, and it should, therefore, be affirmed, with costs.

All concur.

Judgment affirmed.

WEEKS v. MAILLARDET.

IN THE KING'S BENCH, NOVEMBER 23, 1811.

[*Reported in 14 East 568.*]

By an agreement under the hands and seals of these parties, dated London, December 27th, 1809, the defendant engaged to deliver up to the plaintiff, on or before July 15th, 1810, the whole of his mechanical pieces, as per schedule annexed; all the machineries performing and in good order as when first finished, etc.; and further to show to the plaintiff everything that he might want to know for exhibiting and making the said pieces perform. And on the day the defendant delivers the above pieces, as herein mentioned, the plaintiff is to pay the defendant £1000 in money, and £2000 in his notes, etc. (at certain dates). "And it is further agreed that upon either party not complying with the present agreement, the defaulter shall pay to the other party, as a penalty, £1000 except in case of fire, etc. And it is further agreed, that in case of any misunderstanding between the parties, it is to be settled by arbitrators chosen by themselves in the usual way." This was witnessed at the time of the execution by Gedeon Patron. There was also a schedule bearing the same date, and witnessed by the same person (but not signed by the parties themselves), which ran in these terms: "Schedule of the several pieces of mechanism, which according to the present agreement T. Weeks

is to receive from H. Maillardet," etc.; and then followed the description of the several pieces.

The plaintiff declared in covenant for the breach of the above-stated agreement, which was set out in the declaration, and then followed this averment: "And the plaintiff further saith, that to the said articles was then and there annexed and subscribed a certain schedule of the said several pieces of mechanism, which, according to the said agreement, the plaintiff was to receive from the defendant—viz.," etc., and so it set out the list as contained in the schedule. And then it assigned as a breach of the agreement, that the defendant did not deliver up to the plaintiff on or before July 15th, 1810 (then past), nor at any time since, the whole or any part of his mechanical pieces aforesaid, but wholly neglected and refused so to do, whereby he became liable to pay to the plaintiff £1000, etc.

The defendant, after craving *oyer* of the articles, which, including also the schedule, was read to him, pleaded that the said supposed articles of agreement are not his deed. There was also another plea, not material to the present purpose, that the supposed articles were delivered to G. Patron as an *escrow*, upon a condition not performed; and so they were not his deed, and another plea, that they were obtained from the defendant by fraud. Issues were joined upon all these pleas, and at the trial before Lord Ellenborough, C.J., at Westminster, all matters in difference in the cause were referred to the arbitration of a gentleman at the bar, who stated all these matters in his award, and found specially that on the day of the date of the articles of agreement the plaintiff and defendant met together in company with Gedeon Patron, whose name appears as a subscribing witness to the articles, and who was the mutual friend or agent both of the plaintiff and defendant, and was privy to a treaty or negotiation which had been going on for some time between the parties, for the purchase of the several things mentioned in the said schedule, and who was then in possession of a list or inventory of the said things, and upon which both the parties had previously agreed; and that at such meeting Gedeon Patron wrote on separate sheets of paper two parts or copies of so much of the articles of agreement as contain the matter of agreement or covenant between the parties beginning with the words, "London, on this 27th of December," and ending with the words, "In witness whereof we have signed;" and thereupon each of the parties duly signed and sealed, and as his act and deed delivered, both parts or copies of the said paper; and the defendant took up from the table and delivered into the hands of the plaintiff the part or copy

upon which the plaintiff declared, and the plaintiff in like manner took up and delivered into the hands of the defendant the other part or copy ; and soon afterward the plaintiff put into the hands of Gedeon Patron the said part or copy which had been so delivered to him, and then left the room in which they had met ; and the said Gedeon Patron, as the agent of both parties, afterward wrote the form of a guarantee and also the said schedule upon both parts or copies, and gave back to the plaintiff the part or copy that he had received from him. The arbitrator further found and awarded that each of the parties, and also Gedeon Patron, supposed the subscription of the schedule upon the papers after such sealing and delivery to be of the same force and effect as if such schedule had been written thereon before they sealed and delivered the same ; and that the schedule agrees in every respect with the said list or inventory, and contains all the things which the parties intended to buy and sell and no others. And then he awarded that a verdict should be entered for the plaintiff, upon all the issues joined in the cause, with £350 damages, but that no execution should issue thereon until the fifth day of (the present) Michaelmas Term, which was meant to give the defendant an opportunity of taking the opinion of the Court on the validity of the award, in point of law, upon a motion to set it aside.

This was accordingly made on a former day in the term, when it was objected by Topping that the schedule was no part of the deed, having been added to it by the witness after the execution and delivery of the instrument by the parties themselves, and even after one of them had left the room ; and therefore the averment that the schedule was then and there annexed to the deed was falsified by the evidence, which was properly received upon the plea of *non est factum*, to show that the defendant did not execute such a deed as that which was declared upon. For which was cited *Brooke v. Smith*,¹ where a memorandum endorsed on a bond restraining the condition was held on demurrer to be part of the deed, only because it was written before the sealing of the condition. And by *Taylor's Case*,² if it be written after the sealing and delivery, it is no part of the condition. *Cook v. Remington*³ is to the same effect. And *Markham v. Gonaston* ;⁴ *Pigot's Case*,⁵ in which it was held that any material alteration of a deed after its execution, though

¹ Moor, 679, and see *Burgh v. Preston*, 8 Term Rep. 486.

² Hetl. 136.

³ 6 Mod. 237.

⁴ Cro. Eliz. 626, and *vide* note *a* upon this case in *French v. Patton*, 9 East, 354.

⁵ 11 Rep. 27.

for the benefit of the obligor, will avoid it ; and that this may be taken advantage of on the plea of *non est factum*.

Park and *Best* now showed cause against the rule. The body of the deed expressly refers to the schedule, "as per schedule annexed ;" and as the schedule is the very copy of the list of articles which had been beforehand agreed upon by the parties, it must be taken to be the same as if it had been, in fact, annexed before the execution of the articles under seal, and was as well authenticated by the signature of the witness who was the common agent of both parties for this purpose, as if it had been subscribed by the parties themselves. The result of the cases is, that any fraudulent alteration of a deed in a material part will avoid it ; and it is not necessary to contest that point, but it is not true as to every alteration, for in *Zouch v. Clay*,¹ where two executed a bond and delivered it to the obligee, and afterward, by consent of all parties, the name of a third obligor was interlined, who also sealed and delivered it ; this was held not to avoid the bond as to the two first, and it was distinguished from the cause of *Markham v. Gonaston*, where the alteration was made by the consent of the obligors only, without notice to the obligee, though to his use. [Lord Ellenborough, C.J. Those were cases of internal alterations of a deed ; and here the question is of something extrinsic which may work an alteration. But you must contend that "annexed" means "to be annexed."] It must have been obvious to the parties that the schedule was not, in fact, annexed at the time of the execution of the articles ; but it was then agreed upon, and the true addition made immediately afterward. [Lord Ellenborough. The question is whether the plaintiff's allegation, that the schedule "was then and there annexed" to the articles—that is, at the time when they were executed, was proved by showing that it was afterward annexed ; upon the defect of proof of that allegation, I think I should have non-suited the plaintiff at *nisi prius*.] The defendant was estopped by the deed, which states that the schedule was then annexed from showing that it was not. [Lord Ellenborough. I cannot say that he was estopped from taking the objection, that the plaintiff did not prove his allegation in the declaration.] At least it is no objection upon the plea of *non est factum*. The transcript of the schedule could not make part of the deed ; nor could it be less the deed of the party, because something was added to it afterward, which formed no part of it ; it was equally the plaintiff's deed whether the schedule was annexed to it or not. But if advantage can be taken of it at all, it should have

¹ 2 Lev. 35, and 1 Vent. 185 and *vide* *Henfree v. Bromley*, 6 East, 369.

been by pleading the special matter, as was done in Taylor's Case.¹

Topping and Adam, Jr., contra, relied on the cases before mentioned on moving for the rule, in support of the general point respecting the avoidance of deeds by any subsequent alteration or addition; and argued that it could make no difference whether the alteration was in the body of the deed, or by way of addition in a matter referred to by the deed, and material to its operation. And some of the authorities cited show that this is proper evidence upon *non est factum*, in addition to which *Cospey v. Turner*² is expressly in point.

LORD ELLENBOROUGH, C.J. The question is whether the objection can be taken on the plea of *non est factum*, and to determine that it is necessary to decide whether the schedule is virtually a part of the deed. *Verba relata hoc maxime operantur per referentiam ut in eis inesse videntur*.³ If it be no part of, but dehors the deed, the objection fails. What then was the intention of the parties? It was agreed that the defendant should deliver up to the plaintiff by a certain day "the whole of his mechanical pieces, as per schedule annexed;" all the machineries performing and in good order; and the defendant was also to instruct the plaintiff in the manner of exhibiting and making them perform, "and on the day of the defendant's delivering the above pieces as therein mentioned," the plaintiff was to pay him a certain sum. Without the schedule there was no duty to be performed by either party. The schedule alone designates the subject-matters to be delivered up by the one party, and paid for by the other. The whole deed was inoperative, unless the schedule was co-existing with it and forming part of the obligation. Taken by itself, the deed is insensible, and has no object to operate upon, therefore it is not the defendant's deed without the schedule which gives effect and meaning to the whole of the duties to be performed on either side. The articles assume that at the time of their execution the schedule was annexed, and if there were then no schedule there was no deed for any sensible purpose, for no duty could be demanded on the one side or performed on the other without the schedule. The objection, therefore, is well founded.

GROSE, J. At the time of the execution of the articles there was no schedule annexed to which they could apply, but it was written and annexed afterward by the witness, therefore the deed on which the breach is assigned was not the deed of the defendant.

¹ Hetl. 136. A mistake was observed in that report, the word *before* is printed instead of *after* in p. 137, line 14.

² Cro. Eliz. 800.

³ Co. Lit. 359.

LE BLANC, J. The difficulty arises on the form of the plea. At first I thought that the proof that the defendant had executed an instrument in the very terms as set out in the declaration for the delivery of the whole of his mechanical pieces, as per schedule annexed, was sufficient to maintain the declaration upon the plea that it was not the deed of the defendant; and that the averment that there was then and there annexed and subscribed a certain schedule of the said several pieces of mechanism, etc., if not true, should have been taken advantage of by a substantive plea, putting that fact in issue. But as the whole deed is inoperative without the schedule, and as the party is charged with having executed a deed referring to a certain supposed schedule as then annexed, the declaration in effect avers that the defendant executed a deed with such a schedule annexed at the time, and the proof being that he executed the instrument without any such schedule annexed, it is not the instrument which he is charged with having executed.

BAYLEY, J. The plaintiff declares in substance that the defendant executed a scheduled instrument, which the defendant by his general plea denies; and it is part of the issue, the proof of which lies on the plaintiff, to show that the defendant executed a scheduled instrument; this he has failed to prove. And it is material to the party whether he is to be bound by that list of articles to be delivered which he executes at the time, or by one which is to be supplied afterward, and which is to be proved by parol evidence to be the list which was to be annexed.

Rule absolute.

POWELL, ASSIGNEE OF THE SHERIFF OF MIDDLESEX, v.
DUFF.

AT NISI PRIUS, FEBRUARY 17, 1812.

[*Reported in 3 Campbell 181.*]

THE plaintiff declared in the common form upon a bail bond in the penal sum of £194, conditioned for the appearance of one J. S., at the return of a writ of special *capias*.

Plea *non est factum*.

The attesting witness swore that when the bond was to be executed, the defendant was in a great hurry to get away; that for this reason he executed it when only the penal part had been filled up, and that the condition was filled up after he had left the office.

Park contended, that for this reason the bond was void.

Garrow, *contra*, insisted, that this, like all other contracts, must be governed by the meaning of the contracting parties ; that the defendant clearly authorized the filling up of the condition in its present shape ; that the obligatory part of the instrument was enough to render it a binding deed ; and that the case might be likened to a man signing his name on a blank stamp, by which he might be made liable as acceptor of a bill of exchange.

LORD ELLENBOROUGH. A man may render himself liable as a party to a bill of exchange or promissory note, by signing his name on a blank stamp ; but there are certain solemnities indispensable to the validity of deeds. The defendant never did execute a bond with such a condition. The condition is set out in the declaration as part of the instrument, and must have been so, or the plaintiff could not sue as assignee. The plea of *non est factum* must, therefore, be found for the defendant.

The plaintiff submitted to be nonsuited.

Garrow and *Espinasse*, for the plaintiff.

Jervis, for the defendant.

HUDSON v. REVETT.

IN THE COMMON PLEAS, FEBRUARY 7, 1829.

[*Reported in 5 Bingham 368.*]

THIS was an issue directed by the Court of Common Pleas to try whether certain deeds of lease and release, and an accompanying deed of trust, were the deeds of the defendant, and if so, whether they had been obtained by fraud, covin, or misrepresentation.

The lease and release bore date November 25th and 26th, 1825, respectively ; the deed of trust the latter day ; and the object of the deeds was to effect a conveyance of Revett's property to Hudson, in trust to raise money by sale of it for the payment of Revett's debts, with a trust, as to any residue, in favor of Revett ; and " in the first place, for the trustee to pay and defray the costs, charges, and expenses of all parties thereto attending the preparing, settling, completing, and executing those presents, and the several indentures of lease and release therein referred to."

At the trial before Holroyd, J., last Suffolk Summer assizes, Mr. Brown, the attorney who prepared the deeds, and was also

a party to the deed of trust, stated, that on Monday, November 28th, 1825, the defendant being then a prisoner in the King's Bench prison, he, Brown, on the part of the plaintiff and other creditors, and acting, as he conceived, for all parties, went, accompanied by Columbine, the attesting witness, to the defendant in the prison, for the purpose of procuring the execution of the deeds. That they corresponded exactly with drafts which had before been assented to and signed by the defendant ; that blanks were left for the amounts of the debts of various creditors, which were then filled up, with the exception of the blank for the debt of one Mills, a creditor ; that Mills, who was present, claimed £16,000 odd ; but that the defendant showed an account, reducing Mills's debt to £14,858 8s. 8d., and said he had vouchers by which he could confirm the account. The account was admitted, subject to the production of these vouchers ; and it was agreed that the blank for Mills's debt should be filled up when they were produced. The defendant and Mills then executed the deed, leaving the blank to be filled up as above mentioned. This statement was confirmed by the attesting witness, the only other person present. The next day Brown and Mills attended the defendant again ; but Columbine was not present. The defendant produced the vouchers in question ; the balance was struck : Brown filled up the blanks with the sum of £14,858 8s. 8d., and then went away, taking with him the deeds for the purpose of procuring their execution by other parties. The instrument at that time had a deed-stamp (not *ad valorem*), and no new stamp was added. The defendant left the prison shortly afterward, and the deeds were executed in his presence by his wife (who also joined in a fine to enure to the uses of the trust-deed), under his sanction, when he was at liberty.

The plaintiff, the trustee, did not execute the trust-deed till the end of the ensuing December. Many letters were subsequently written by the defendant, in which he not only treated the deeds as valid instruments, but ordered the occupiers of the property to pay their rents to the plaintiff, and the steward of the manor to deliver up his books and the rolls of the manor to Brown. It appeared, further, that he had told one Chapman that he had executed the deeds, and had gained time ; also, that he had carried into effect the fine that was to pass his wife's interest.

Brown was objected to as a witness, as having an interest to support the deed in order to recover his own charges, and as being defendant in an action of trespass, in which his defence rested on a claim to property under this deed. See *Revett v.*

Brown.¹ But it was answered, that though by an express clause in the deed the trustee was authorized to defray those charges out of the property, he was personally liable to Brown under his retainer ; that Brown could recover against him only by virtue of that retainer, and that the deed would be no evidence in support of Brown's claim. The learned Judge overruled the objection.

No evidence was offered on the part of the defendant ; but the following passage in Bull. N. P., p. 267, was relied on : " If there be blanks left in an obligation in places material, and filled up afterward by the assent of parties, yet is the obligation void, for it is not the same contract that was sealed and delivered : as if a bond were made to C., with a blank left after for his Christian name and for his addition, which is afterward filled up."

Holroyd, J., told the jury it did not appear in the passage cited that the alteration was made in the presence of the party, but that, if in such a case there was that which amounted to a redelivery, and showed that the party meant the deed should be acted on in its altered state, the alteration being made in his presence would amount to a redelivery, and the deed would be his in its altered state ; he referred to Goodright d. Carter v. Straphan,² where the redelivery by a *feme*, after *baron's* death, of a deed delivered by her while *covert*, was held a sufficient confirmation of the deed to bind her without re-execution or re-attestation, and said that circumstances alone might be equivalent to a redelivery. Then, observing on the fact that the blank in the present case had, according to a previous arrangement, been filled up in the defendant's presence, and with his consent, that he had afterward assisted at and sanctioned the execution of the deed by his wife, and had acted upon it as a valid instrument, he said, that unless the jury disbelieved the evidence, there was abundant ground for their considering this deed as the deed of the defendant : of fraud or covin no evidence had been offered.

The jury found that the deeds were the deeds of the defendant, and that the execution of them had not been obtained by any fraud, covin, or misrepresentation.

Wilde moved for a new trial, on the ground that Brown ought not to have been admitted as a witness, and that the deed was void, having been altered in a material particular after its execution, without any redelivery. There was also an objection to the stamp.

A redelivery, he contended, could only be implied where there

¹ *Ante*, Vol. V. p. 7.

² Cowp. 201.

was no evidence to rebut the presumption ; here, the circumstance that the deed was always out of Revett's possession was evidence sufficient to rebut any such presumption. In *Goodright v. Straphan* the deed had never been executed at all before the death of the husband, for an execution by a *feme covert* was altogether void ; here the deed was once well executed, and there could be no new execution actual or implied without a new stamp. A rule *nisi* having been granted,

Storks and Russell showed cause.

Wilde, for the defendant.

BEST, C.J. This brings us, therefore, to the great questions in this case.¹ They have been divided into two. It has been first insisted that there was no perfect execution of the deed until the sum of £14,858 was written in it ; and if there was not a perfect execution of the deed up to that time, then it was competent for my brother Holroyd to refer it to the jury, to consider whether they would not presume an execution of the deed after all the sums were written in and it was rendered a perfect deed. I am of opinion that this is a correct view of the case ; and if it is, it comes precisely within the principle of the case to which my brother Holroyd has referred, of *Doe d. Carter v. Straphan*. In that case a deed had been executed by a married woman, and, as such, was undoubtedly void. After the death of her husband, she, by various acts, confirmed this deed. The Court of King's Bench decided, that by the confirmation of the deed the jury were warranted in presuming a re-execution of it. Undoubtedly, in that case, Lord Mansfield refers to a passage in *Perkins*, where he says, "It is to be known that a deed cannot have and take effect at every delivery as a deed ; for if the first delivery takes effect the second delivery is void ; and in case an infant or a man in prison makes a deed and delivers the same as his deed, and afterward when the infant comes to his full age, or the man in prison when at large delivers the same again as his deed which he delivered before as his deed, this second delivery is void." That brings us to the question, Was there any perfect delivery of this deed antecedent to the period when these sums were written in ? If one looks at the deed, and particularly at that part of the deed which my learned brother has referred us to, it is quite impossible that the deed could be considered as having any operation till these sums were actually written in, because, what was the object of the deed ? The object of all the deed was to convey the estates to trustees, that those estates might be sold, and that the proceeds of those estates

¹ Only so much of the opinion is given as relates to these questions.

might be applied to pay certain creditors' debts which were to be ascertained. In the preparation of the draft of this deed blanks were left for the insertion of the sums when those sums should be ascertained. When these parties met in the King's Bench prison, can it be said that that was a perfect execution of the deeds, when the sums that were due to these creditors remained unascertained? The operative part of the deed refers to the payment of particular sums, which, as then, were unascertained. It is quite clear, if nothing had passed at this time, that the deed could not be an operative deed until those sums were introduced, because the great object of the deed was the payment of those sums. I think, therefore, taking it in this point of view, that this was not to be considered as an execution of the deed—that this was not a complete deed—and that therefore the case falls within the authority of the case in Cowper, and not within the law which is extracted from Perkins.

This deed, as I have stated, undoubtedly was not to be considered as complete until the sums were introduced. But it has been said, if it was delivered to the party it could not be delivered as an *escrow*, unless so delivered, in terms. Perhaps, technically speaking, this is so; because a deed delivered to a party is not an *escrow*, a deed delivered to a stranger is an *escrow* till something is done; but though it is delivered to a party, there are cases, and in the same page, to which my learned brother referred, to show that it is not a perfect and complete deed; Com. Dig. tit. Faits (A 3): "So if it be once delivered as his deed, it is sufficient, though he afterward explained his intent otherwise, as if an obligation be made to A. and delivered to A. himself as an *escrow*, to be his deed on the performance of a condition, this is an absolute delivery, and the subsequent words are void and repugnant." The authorities referred to in the text, in support of this position, are at least conflicting; but in the next division (A 4) it appears that this position about delivery as an *escrow* is merely a technical subtlety; for the learned writer says, "If it be delivered to the party as an *escrow*, to be his deed on the performance of a condition, it is not his deed till the condition is performed, though the party happens to have it before the condition is performed." This he lays down on his own authority, without referring to any case; and I am warranted in saying we cannot have a better authority than that learned writer.

Let us see how that doctrine applies to the present case. The parties meet; something is to be done before a complete deed can be made; the sums are to be ascertained which the different creditors are to be paid. That cannot be ascertained that day,

it is ascertained at a subsequent day, and they are written in. Take it, if you please, that this is a delivery of the deed as a deed, is it not a delivery of the deed in the language of Lord Coke, upon condition—that is, upon condition that something is to be done, which at that time was not done? That something is afterward done; then, and not till then, it becomes a perfect deed. It seems to me, therefore, without touching any of the cases that have been decided on the operation of deeds, we may say that this deed was not a complete deed, executed so as to have effect in the hands of the parties until these sums were written in.

I shall not, after what I have said, travel through the different cases that have been cited with respect to the alteration of deeds; but I beg not to be taken as deciding, that if a deed be altered with the consent of all the parties, after it is executed, it is not to be considered as a good deed. I think, if we were driven to examine that question, it would be found that, in these times, whatever might have been thought formerly, if all the parties assent to the alteration of a deed, it will, in its altered shape, be a good deed; but I do not decide this case on that ground. I decide it on this, that it either was no deed at all, until the sums were written in, and that then the jury were warranted in presuming a delivery to make it a deed; or, if it were a deed, it was delivered only to have operation from the time that those sums were written in, which were to give it all its effect. I think we must take it, from what passed at the time of the execution, it was not to be considered as having effect, till it could have its full effect, by all the sums being written in, that were to be written in. On these grounds I am of opinion that the rule should be discharged.

My brother Burrough,¹ who heard the argument, desired I should state he concurred in this opinion.

GASELEE, J. This case has been extremely well argued, and a great many authorities have been referred to which it is not necessary to go through at length. The authority that struck me the most as against the opinion of my Lord Chief Justice as now delivered, was the passage cited from Buller: "If there be blanks left in an obligation in places material, and filled up afterward by the assent of the parties, yet is the obligation void, for it is not the same contract that was sealed and delivered." That is certainly borne out by the authority in Roll's Abr. But I think the instance which he specifies is not borne out by the authority to which he refers. He goes on: "As if a bond be made to C., with a blank left for his Christian name,

¹ He was at chambers. Park, J., was absent from ill-health.

and for his addition, which is afterward filled up." I should certainly have thought that the leaving the blank for the Christian name and the addition imported of itself it was to be afterward filled up ; and I think that Justice Buller's position is not warranted by the authority to which he refers. Certainly this case does not range itself within the first part of the sentence, because, notwithstanding the degree of industry with which my brother Wilde has cited cases, and the confidence with which he argued that the contract was altered, I cannot agree with him on that ; it appears to me, from what was done in this case, that the contract was not altered. What was the object of the contract ? The contract was to pay all that Revett was indebted to Mills and other creditors ; that which was uncertain when the deed was first executed, or, rather, when the deed was originally sealed, was afterward reduced to a certainty. And the way in which I consider that this deed is good is this—that it was an imperfect execution, with an agreement at the time that it should take effect when the blanks were filled up. There was a meeting for that purpose, the sums at that time were agreed to, and it was filled up by Brown, who was adopted as the agent of both parties ; and he took away the deed for the purpose of carrying it to other parties, by whom it was also to be executed. It is said that the defendant Revett never had himself the possession of this deed. No ; but a deed may be delivered either by taking hold of the deed itself, or by words, or by acts. The permitting this person to take the deed away for the purpose of the other parties executing it, is of itself fit to be left to the jury, as a question whether or not that was not (if a redelivery should be held to be necessary) a redelivery on the mere insertion of the sums. On that ground I am of opinion this trust deed is to be considered as good.

With respect to the witness Brown, I should have great difficulty on the subject, taking it in the usual course, in saying that Brown would be a witness. He is a party to the deed, and he had, at the time of the trial, incurred expenses, and the expenses were to be paid according to the terms of the deed. But, considering it in the point of view in which my Lord Chief Justice has considered it, and in which I have known issues, directed by the Court of Chancery, treated, where the object was to satisfy the conscience of the Court ; if, upon the whole, we see that justice has been done, there is no occasion to send it down to a new trial. Now, has justice been done here ; and does it depend really and singly on the testimony of Brown ? First of all, What is the probability ? The probability of the case is, that it was left for future consideration. There are a

great many blanks when the deed is carried to be executed the first day in the King's Bench ; all the blanks were filled up, except Mill's debt ; the probability is, that at that time Mill's debt was not ascertained ; we have it from Brown it was done the next day. Does it rest on his evidence only ? Mr. Chapman says, " I saw Revett afterward, with the draft of the deed before him ; he was reading ; he told me he had executed it, and that he had got time ;" therefore, the evidence of Chapman shows that what was done the second day of meeting was done with Revett's assent. But it does not rest there ; it appears that Revett was cognizant of all he had done, and he expressly acts upon and confirms the deed ; for he says, in a letter to Moss, a tenant, " Having this day executed to Mr. Thomas Hudson, of the firm of Messrs. Harveys and Hudsons, bankers at Norwich, a conveyance of all my estate and hereditaments, in trust, for the purpose of satisfying various charges and incumbrances, on the above property, I write to desire that you will in future pay your rents to the said Thomas Hudson, or his appointed receiver, whose receipt will be a sufficient discharge." That letter, therefore, shows the confirmation of the contract ; it shows he was aware of what had been done, and I think satisfies the Court that the jury upon this occasion have done justice.

Rule discharged.

SECTION III.—CONSIDERATION.

CANDOR AND HENDERSON'S APPEAL.

IN THE SUPREME COURT, OF PENNSYLVANIA, 1856.

[*Reported in 27 Pennsylvania State Reports 119.*]

APPEAL from the Orphans' Court of Union County.

This was an appeal by Robert Candor and Samuel Henderson, executors of William B. Sullivan, deceased, from the decree of the Orphans' Court, refusing them credit for a payment claimed in their account.

On November 2d, 1849, the decedent gave a bond to David Marr, in trust for Mary Adaline Sullivan, his daughter, for \$2000, payable ten years after date, or at his death, if that should take place sooner. Afterward, on July 13th, 1850, the decedent executed his last will, which was duly proved on September 17th, following, in which is contained the following

bequest, to wit : " Item—I give and bequeath to my daughter, Mary Adaline (in lieu of bond which I gave to David Marr, in her favor), the one half of the residue of my estate, real and personal." The guardian of the child refused to accept of the bequest under the will of the testator, and claimed the amount of the bond aforesaid. The executors paid the amount of the bond to the guardian, and took his receipt ; and in their account filed, claimed credit for the said payment. This item on the credit side of the account was excepted to. Samuel Weirick, Esq., was appointed auditor, and sustained the exception. The accountants excepted to the report of the auditor, but their exceptions were overruled by the court, and the auditor's report confirmed. And from this decree the accountants appealed.

The confirmation of the report of the auditor was the error assigned. The appellees also moved to quash the appeal because not taken within twenty days.

Lawson, for appellants.

Miller, for appellees.

The opinion of the court was delivered by

LEWIS, C.J. The limitation of twenty days allowed for appeals in certain cases has no application to appeals from decrees of the Orphans' Court adjusting an administration account. The appeal is in time, and the motion to quash it is overruled.

The auditor reports that the testator "gave" the bond in question. There is nothing in any part of the record to impair the force of this finding, or to create a belief that it is erroneous in point of fact. The possession of the bond, by the executors, after they have paid it, and are entitled to the possession of it as a voucher, is no evidence to show that it never was given. At least this circumstance cannot have the effect of overthrowing the positive finding of the auditor.

The bond is made payable "ten years after date," irrespective of the question whether the obligor should be living or dead at that time. There is, therefore, no ground for holding it to be a *donatio mortis causa*.

It is under seal, and is found expressly to be a "voluntary" bond. The seal imports a consideration, and creates a legal obligation. In a "voluntary" bond no consideration is contracted for or expected. The absence of one is therefore no ground for equitable relief from a contract conceded to be good at law, without it. To say that the "want of consideration" is a defence against a bond is to express, in language not remarkable for precision, nothing more than the familiar prin-

ciple that where the obligor fails to receive the consideration contracted for, and on the faith of which he entered into the contract, he is not bound to pay his bond. This principle has no application whatever to the case before us, because no consideration was contracted for or expected. A voluntary bond; it is true, must be postponed until creditors are paid; but it is always good against the party himself, and against heirs, legatees, and others who stand in no higher equity. 2 Williams on Executors, 871; 3 P. Wms. 223; 2 Mylne & K. 769. In this respect a simple contract differs from a specialty. In the one case the party is not bound without a consideration. 5 T. R. 8. In the other no consideration is necessary if none was contracted for. 17 John. Rep. 301.

ALLER v. ALLER.

IN THE SUPREME COURT OF NEW JERSEY, NOVEMBER TERM, 1878.

[*Reported in 40 New Jersey Law Reports*, 446.]

ON rule to show cause why a new trial should not be granted on verdict for the plaintiff in Hunterdon County Circuit Court.

The action was brought on the following instrument, viz.: "One day after date, I promise to pay to my daughter, Angelina H. Aller, the sum of three hundred and twelve dollars and sixty-one cents, for value received, with lawful interest from date, without defalcation or discount, as witness my hand and seal this fourth day of September, one thousand eight hundred and seventy-three. \$312.61. This note is given in lieu of one half of the balance due the estate of Mary A. Aller, deceased, for a note given for one thousand dollars to said deceased by me. Peter H. Aller. [L. s.] Witnesses present, John J. Smith, John F. Grandin."

Both subscribing witnesses were examined at the trial, and it appeared that there was a note for \$1000, dated May 1st, 1858, given by said Peter H. Aller to Mary Ann Aller, upon which there were endorsements of payments—April 1st, 1863, \$50; April 1st, 1866, \$46; April 1st, 1867, \$278.78.

Mary Ann Aller, the wife, died, and on the day after her burial, Peter H. Aller told his daughter, the plaintiff, to get the note, which he said was among her mother's papers. She brought it, read the note; he said there was more money endorsed on it than he thought; requested the witness John F.

Grandin to add up the endorsements and subtract them from the principal, to divide the balance by two, and draw a note to each of her daughters, Leonora and Angelina, for one half. After they were drawn by the witness, Peter H. Aller said : " Now here, girls, is a nice present for you," and gave them the notes. Angelina was directed to put the old note back among her mother's papers. Grandin was afterward appointed administrator of Mary A. Aller, and as such, he says, he destroyed the old note.

The letters of administration ; a copy of the original note and endorsements thereon ; a deed of release by Peter H. Aller to Leonora Sharp and Angelina H. Aller, in which, for the consideration of one dollar, and of natural love and affection, he released all his right and interest, " by the curtesy," to all the real and personal estate of said Mary A. Aller, deceased, which is dated September 8th, 1873 ; and the last will and testament of Peter H. Aller were offered in evidence.

This action was brought by Angelina H. Aller, now Angelina H. McPherson, against Peter H. Aller in his lifetime, and, after his death, continued against his executor, Michael Shurts.

The defendant, Peter H. Aller, was aged and feeble, and the plea was, therefore, filed in his lifetime, by consent, without affidavit.

Argued at June Term, 1878, before Beasley, C.J., and Depue, Scudder, and Knapp, J.J.

G. A. Allen and J. R. Emery, for plaintiff.

J. T. Bird, for defendant.

The verdict was for the plaintiff, and the rule to show cause was allowed at the Circuit.

The opinion of the Court was delivered by

SCUDDER, J. Whether the note for \$1000 could have been enforced in equity as evidence of an indebtedness by the husband to the wife during her life, is immaterial, for after her death he was entitled, as husband of his deceased wife, to administer on her estate, and receive any balance due on the note, after deducting legal charges, under the Statute of Distribution. The daughters could have no legal or equitable claim on this note against their father after their mother's decease. The giving of these two sealed promises in writing to them by their father was therefore a voluntary act on his part. That it was just and meritorious to divide the amount represented by the original note between these only two surviving children of the wife, if it was her separate property, and keep it from going into the general distribution of the husband's estate among his other children, is evident, and such appears to have been his purpose.

The question now is, whether that intention was legally and conclusively manifested, so that it cannot now be resisted.

This depends on the legal construction and effect of the instrument which was given by the father to his daughter.

It has been treated by the counsel of the defendant in his argument as a promissory note, and the payment was resisted at the trial on the ground that it was a gift. Being a gift *inter vivos*, and without any legal consideration, it was claimed that the action could not be maintained. But the instrument is not a promissory note, having the properties of negotiable paper by the law merchant, nor is it a simple contract, with all the latitude of inquiry into the consideration allowable in such a case, but it is in form and legal construction a deed under seal. It says in the body of the writing "as witness my hand and seal," and a seal is added to the name of Peter H. Aller. It is not, therefore, an open promise for the payment of money, which is said to be the primary requisite of a bill or promissory note, but it is closed or sealed, whereby it loses its character as a commercial instrument and becomes a specialty governed by the rules affecting common law securities. 1 Daniell's Neg. Inst., §§ 1, 31, 34.

It is not at this time necessary to state the distinction between this writing and corporation bonds and other securities which have been held to have the properties of negotiable paper by commercial usage. This is merely an individual promise "to pay my daughter, Angeline H. Aller, the sum of \$312.61, for value received," etc. It is not even transferable in form, and there is no intention shown upon its face to make it other than it is clearly expressed to be, a sealed promise to pay money to a certain person or a debt in law under seal. How, then, will it be affected by the evidence which was offered to show that it was a mere voluntary promise, without legal consideration, or, as it was claimed, a gift unexecuted?

Our statute concerning evidence (Rev., p. 380, § 16) which enacts that in any action upon an instrument in writing, under seal, the defendant in such action may plead and set up as a defence therein fraud in the consideration, is not applicable, for here there is no fraud shown.

But it is said that the act of April 6th, 1875 (Rev., p. 387, § 52), opens it to the defence of want of sufficient consideration, as if it were a simple contract, and, that being shown, the contract becomes inoperative.

The statute reads: "That in every action upon a sealed instrument, or where a set-off is founded on a sealed instrument, the seal thereof shall be only presumptive evidence of a suffi-

cient consideration, which may be rebutted, as if such instrument was not sealed," etc.

Suppose the presumption that the seal carries with it, that there is a sufficient consideration, is rebutted, and overcome by evidence showing there was no such consideration, the question still remains, whether an instrument under seal, without sufficient consideration, is not a good promise and enforceable at law. It is manifest that here the parties intended and understood that there should be no consideration. The old man said, "Now here, girls, is a nice present for each of you," and so it was received by them. The mischief which the above quoted law was designed to remedy, was that where the parties intended there should be a consideration, they were prevented by the common law from showing none, if the contract was under seal. But it would be going too far to say that the statute was intended to abrogate all voluntary contracts, and to abolish all distinction between specialties and simple contracts.

It will not do to hold that every conveyance of land, or of chattels, is void by showing that no sufficient consideration passed when creditors are not affected. Nor can it be shown by authority that an executory contract, entered into intentionally and deliberately, and attested in solemn form by a seal, cannot be enforced. Both by the civil and the common law, persons were guarded against haste and imprudence in entering into voluntary agreements. The distinction between *nudum pactum* and *pactum vestitum*, by the civil law, was in the formality of execution and not in the fact that in one case there was a consideration, and in the other none, though the former term, as adopted in the common law, has the signification of a contract without consideration. The latter was enforced without reference to the consideration because of the formality of its ratification. 1 Parsons on Cont. (6th ed.) 427.

The opinion of Wilmot, J., in *Pillans v. Van Mierop*, 3 Burr. 1663, is instructive on this point.

The early case of *Sharington v. Strotton*, Plow. 308, gives the same cause for the adoption of the sealing and delivery of a deed. It says, among other things, "Because words are oftentimes spoken by men unadvisedly and without deliberation, the law has provided that a contract by words shall not bind without consideration. And the reason is, because it is by words which pass from men lightly and inconsiderately, but where the agreement is by deed there is more time for deliberation, etc. So that there is great deliberation used in the making of deeds, for which reason they are received as a lien final to the

party, and are adjudged to bind the party without examining upon what cause or consideration they were made. And therefore in the case put in 17 Ed. IV., if I by deed promise to give you £20 to make your sale *de novo*, here you shall have an action of debt upon the deed, and the consideration is not examinable, for in the deed there is sufficient consideration—viz., the will of the party that made the deed." It would seem by this old law that in case of a deed the saying might be applied, *stat pro ratione voluntas*.

In Smith on Contracts the learned author, after stating the strictness of the rules of law, that there must be a consideration to support a simple contract to guard persons against the consequences of their own imprudence, says: "The law does not absolutely prohibit them from contracting a gratuitous obligation, for they may, if they will, do so by deed."

This subject of the derivation of terms and formalities from the civil law, and of the rule adopted in the common law, is fully described in Fonb. Eq. 335, note *a*. The author concludes by saying: "If, however, an agreement be evidenced, by bond or other instrument, under seal, it would certainly be seriously mischievous to allow its consideration to be disputed, the common law not having pointed out any other means by which an agreement can be more solemnly authenticated. Every deed, therefore, in itself imports a consideration, though it be only the will of the maker, and therefore shall never be said to be *nudum pactum*." See also 1 Chitty on Cont. (11th ed.) 6; Morly v. Boothby, 3 Bing. 107; Rann v. Hughes, 7 T. R. 350, note *a*.

These statements of the law have been thus particularly given in the words of others, because the significance of writings under seal, and their importance in our common law system, seem in danger of being overlooked in some of our later legislation. If a party has fully and absolutely expressed his intention in a writing sealed and delivered, with the most solemn sanction known to our law, what should prevent its execution where there is no fraud or illegality? But because deeds have been used to cover fraud and illegality in the consideration, and just defences have been often shut out by the conclusive character of the formality of sealing, we have enacted in our State the two recent statutes above quoted. The one allows fraud in the consideration of instruments under seal to be set up as defence, the other takes away the conclusive evidence of a sufficient consideration heretofore accorded to a sealed writing, and makes it only presumptive evidence. This does not reach the case of a voluntary agreement, where there was no consideration, and none intended by the parties. The statute

establishes a new rule of evidence, by which the consideration of sealed instruments may be shown, but does not take from them the effect of establishing a contract expressing the intention of the parties, made with the most solemn authentication, which is not shown to be fraudulent or illegal. It could not have been in the mind of the legislature to make it impossible for parties to enter into such promises; and without a clear expression of the legislative will, not only as to the admissibility, but the effect of such evidence, such construction should not be given to this law. Even if it should be held that a consideration is required to uphold a deed, yet it might still be implied where its purpose is not within the mischief which the statute was intended to remedy. It was certainly not the intention of the legislature to abolish all distinction between simple contracts and specialties, for in the last clause of the section they say that all instruments executed with a scroll, or other device by way of scroll, shall be deemed sealed instruments. It is evident that they were to be continued with their former legal effect, except so far as they might be controlled by evidence affecting their intended consideration.

If the statute be anything more than a change of the rules of evidence which existed at the time the contract was made, and in effect makes a valuable consideration necessary, where such requisite to its validity did not exist at that time, then the law would be void in this case, because it would impair the obligation of a prior contract. This cannot be done. Cooley on Const. Lim. 288, and notes.

The rule for a new trial should be discharged.

JAMES MCMILLAN *v.* ELI B. AMES.

IN THE SUPREME COURT OF MINNESOTA, MARCH 11, 1885.

[*Reported in 33 Minnesota Reports 257.*]

PLAINTIFF, as assignee of the contract set forth in the opinion, brought this action in the District Court of Hennepin County, to recover damages for an alleged breach. The complaint sets out the making of the contract, and the assignment of all interest in it to plaintiff, alleges tender of full performance on the part of plaintiff on January 10th, 1884, and a refusal to perform on the part of defendant, and asks \$7550 damages.

On the trial before Lochren, J., and a jury, it was admitted that the market value of the premises on January 10th, 1884,

was \$11,500. Plaintiff offered in evidence the contract, which was objected to and excluded, and a verdict was directed for defendant. Plaintiff appeals from an order refusing a new trial.

Scott, Longbrake & Van Cleve, A. J. Shores, and Eli Torrance for the appellant.

Babcock & Davis for the respondent.

VANDERBURGH, J. On the day it bears date the defendant executed and delivered to James McMillan & Co. the following covenant or agreement under seal, which was subsequently assigned to the plaintiff :

“ EXHIBIT A.

“ I, E. B. Ames, of Minneapolis, Minn., for the consideration hereinafter mentioned, do hereby promise and agree to grant, bargain, sell, and convey, by good and lawful warranty deed, unto James McMillan & Co., their heirs and assigns, in fee simple, free from all incumbrances, at any time between the date of this instrument and the third day of August, 1884, that the said James McMillan & Co. may elect, that certain real estate situate in the county of Hennepin and State of Minnesota, and described as follows—to wit, a part of lots nine (9) and ten (10), in block twenty (20), in the town of Minneapolis, being a tract of land twenty-seven (27) feet wide, fronting on First Avenue south, and extending back ninety-nine (99) feet, together with the brick and stone building standing thereon, together with all the appurtenances thereunto belonging.

“ The consideration above mentioned and referred to is the payment to me by the said James McMillan & Co. of the sum of \$3500, and the further payment of the taxes duly assessed upon said real estate between the second day of August, 1879, and the date of the execution and delivery of said deed. Said payments to be made at the time of the execution and delivery of said deed, unless otherwise agreed to by said James McMillan & Co. and myself.

“ It is hereby expressly understood and agreed that in case of a violation of the lease under which the said James McMillan & Co. now hold said real estate, I am to be released from any and all promises contained and by me made in this instrument.

“ Witness my hand this sixth day of October, 1879, the same being the date of this instrument.

“ E. B. AMES. [Seal.]”

By the terms of this instrument, which is admitted to have been sealed by defendant, he covenanted to convey the premises upon the consideration and condition of the payment by the

covenantees of the sum named, on or before the date fixed in the writing. Before performance on their part, the defendant notified them of his withdrawal and rescission of the promise and obligation embraced in such written instrument, and thereafter refused the tender of payment and offer of performance by the plaintiff in conformity therewith, as alleged in the complaint, and within the time limited. On the trial, it appearing that such notice of rescission had been given, the Court rejected plaintiff's offer to introduce the writing in evidence, and dismissed the action.

The only question presented on this appeal is whether plaintiff's promise or obligation was *nudum pactum* and presumptively invalid for want of a consideration, or whether, being in the nature of a covenant, the defendant was bound thereby, subject to the performance of the conditions by the covenantees.

Apart from the effect of the seal as evidencing a consideration binding the defendant to hold open his proposition, or rather validating his promise subject to the conditions expressed in the writing, it is clear that such promise, made for a consideration thereafter to be performed by the plaintiff at his election, would take effect as an offer or proposition merely, but would become binding as a promise as soon as accepted by the performance of the consideration, unless previously revoked or it had otherwise ceased to exist. Langdell on Cont. § 70; Boston & M. R. R. v. Bartlett, 3 Cush. 224, 228. In the case cited there was a proposition to sell land by writing not under seal. The Court held the party at liberty to withdraw his offer at any time before acceptance, but not after, within the appointed time, because until acceptance it was a mere offer, without a consideration or a corresponding promise to support it, and the Court say: "Whether wisely or not, the common law unyieldingly insists upon a consideration, or a paper with a seal attached."

If, however, his promise is binding upon the defendant, because contained in an instrument under seal, then it is not a mere offer, but a valid promise to convey the land upon the condition of payment. All that remained was performance by plaintiff within the time specified to entitle him to a fulfilment of the covenant to convey. Langdell on Cont. §§ 178, 179. As respects the validity or obligation of such unilateral contracts, the distinction between covenants and simple contracts is well defined and established. Anson, Cont. 12; Chit. Cont. 5; Leake, Cont. 146; 1 Smith, Lead. Cas. (7th ed.) 698; Wing v. Chase, 35 Me. 260; Willard v. Tayloe, 8 Wall. 557.

In Pitman v. Woodbury, 3 Exch. 4, 11, Parke, B., says:

“The cases establish that a covenantee in an ordinary indenture, who is a party to it, may sue the covenantor, who executed it, although he himself never did ; for he is a party, although he did not execute, . . . and it makes no difference that the covenants of the defendant are therein stated to be in consideration of those of the covenantee. Of this there is no doubt, nor that a covenant binds without consideration.” *Morgan v. Pike*, 14 C. B. 473, 484 ; *Leake, Cont.* 141. The covenantee in such cases may have the benefit of the contract, but subject to the conditions and provisos in the deed. These obligations frequently take the form of bonds, which is only another method of forming a contract, in which a party binds himself as if he had made a contract to perform ; a consideration being necessarily implied from the solemnity of the instrument. The consideration of a sealed instrument may be inquired into ; it may be shown not to have been paid (*Bowen v. Bell*, 20 John. 338), or to be different from that expressed—*Jordan v. White*, 20 Minn. 77 (91) ; *McCrea v. Purmort*, 16 Wend. 460—or as to a mortgage that there is no debt to secure (*Wearse v. Peirce*, 24 Pick. 141), etc. ; but, except for fraud or illegality, the consideration implied from the seal cannot be impeached for the purpose of invalidating the instrument or destroying its character as a specialty.

It is true that equity will not lend its auxiliary remedies to aid in the enforcement of a contract which is inequitable, or is not supported by a substantial consideration, but at the same time it will not on such grounds interfere to set it aside. But no reason appears why equity might not have decreed specific performance in this case (had the land not been sold), because the substantial and meritorious consideration required by the Court in such case would consist in that stipulated in the instrument as the condition of a conveyance, performance of which by the plaintiff would have been exacted as a prerequisite to relief, so as to secure to defendant mutuality in the remedy, and all his rights under the contract. The inquiry would not, in such case, be directed to the constructive consideration evidenced by the seal, for a mere nominal consideration would have supported defendant's offer or promise upon the prescribed conditions. *Leake, Cont.* 17, 18 ; *Western R. Co. v. Babcock*, 6 Met. 346 ; *Yard v. Patton*, 13 Pa. St. 278, 285 ; *Candor's Appeal*, 27 Pa. St. 119.

If, then, defendant's promise was irrevocable within the time limited, plaintiff might certainly seek his remedy for damages, upon the facts alleged in the pleadings, upon showing performance or tender thereof on his part.

There is a growing tendency to abrogate the distinction between sealed and unsealed instruments ; in some States by legislation, in others to a limited extent by usage or judicial recognition. *State v. Young*, 23 Minn. 551 ; 1 Pars. Cont. 429. But the significance of the seal as importing a consideration is everywhere still recognized, except as affected by legislation on the subject. It has certainly never been questioned by this Court. In Pennsylvania the courts allow a party, as an equitable defence in actions upon sealed instruments, to show a failure to receive the consideration contracted for, where an actual valuable consideration was intended to pass, and furnished the motive for entering into the contract. *Candor's Appeal*, 27 Pa. St. 119 ; *Yard v. Patton*, *supra*. But whatever the rule as to equitable defences and counterclaims under our system of practice may properly be held to be in the case of sealed instruments, it has no application, we think, to a case like this, where full effect must be given to the seal. Under the civil law the rule is that a party making an offer, and granting time to another in which to accept it, is not at liberty to withdraw it within the appointed time, it being deemed inequitable to disappoint expectations raised by such offer, and leave the party without remedy. The common law, as we have seen, though requiring a consideration, is satisfied with the evidence thereof signified by a seal. *Boston & M. R. R. v. Bartlett*, *supra*. The same principle applies to a release under seal, which is conclusive though disclosing on its face a consideration otherwise insufficient. *Staples v. Wellington*, 62 Me. 9 ; *Wing v. Chase*, 35 Me. 260.

These considerations are decisive of the case, and the order denying a new trial must be reversed.

PAUL K. L. E. KRELL AND ANOTHER v. ROBERT
CODMAN.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS,

OCTOBER 24, 1891.

[*Reported in 154 Massachusetts Reports 454.*]

CONTRACT against the executor of the will of Martha G. Wheelwright, upon a covenant in an indenture under seal, dated February 13th, 1885. The case was heard in January, 1890, by Field, J., and reported by him for the consideration of the full Court, and was as follows.

The indenture was executed by "Martha Gerrish Wheelwright, of Roslyn House, Oatlands Park, in the county of Surrey, widow, of the one part, and Paul Karl Ludwig Emil Krell, of the same place, Esquire, and Charles Watkins, of No. 19 Oakley Square, in the parish of St. Pancras, in the county of Middlesex, Esquire, of the other part," and provided as follows: "Whereas the said Martha Gerrish is desirous of making some provision for Constance Hope Eagle, the adopted child of the said Paul Karl Ludwig Emil Krell, and of his wife, Maria Augusta Krell, the daughter of the said Martha Gerrish Wheelwright, the said Constance Hope Eagle being now seven years of age and residing at Roslyn House, Oatlands Park, aforesaid, Now this indenture witnesseth that in consideration of the love and affection of the said Martha Gerrish Wheelwright for the said Constance Hope Eagle, and for divers other good causes and considerations, the said Martha Gerrish Wheelwright doth hereby covenant with the said Paul Karl Ludwig Emil Krell and Charles Watkins, or the survivor of them or the executors or administrators of such survivor, or other the trustees or trustee for the time being of these presents (hereinafter called the trustees or trustee), that, in case the said Constance Hope Eagle shall survive her the said Martha Gerrish Wheelwright, the executors or administrators of her the said Martha Gerrish Wheelwright shall, within six calendar months after her death, pay to the trustees or trustee the sum of £2500, with interest thereon at the rate of 4 per cent per annum from the day of her death, provided always that the said Martha Gerrish Wheelwright shall be at liberty to pay the said sum of £2500, or any part thereof, to the trustees or trustee at any time during her lifetime." The indenture then provided that the trustees should invest the sum above named only in English or Colonial securities, and should hold the same for the benefit of Constance Hope Eagle; but it was further agreed that, "if the said Constance Hope Eagle shall not survive the said Martha Gerrish Wheelwright, or surviving her shall not live to attain the age of twenty-one years, nor to marry under that age, then subject to the trusts and powers hereinbefore declared and contained, or by law vested in the trustees or trustee, shall stand possessed of the trust premises and the income thereof, in trust for the said Martha Gerrish Wheelwright, her executors, administrators, and assigns absolutely."

This indenture was drawn and settled on behalf of all parties by a firm of English solicitors, and executed at Walton-on-Thames, Surrey, England. By the law of England a covenant such as that contained in this instrument constitutes a debt of

the covenantor legally chargeable upon his or her estate, ranking after debts for value, but before legacies. At the date of the indenture Mrs. Wheelwright was living with her daughter, who was the wife of the first-named plaintiff, and the child, Constance Hope Eagle, was living with and supported by Mr. and Mrs. Krell, but was never legally adopted by them. She was still a minor, and lived with them in England. Mrs. Wheelwright died on August 30th, 1888, and at the time of her death was domiciled in Newburyport in this Commonwealth, and her will, which was executed in this Commonwealth on October 10th, 1881, was duly proved here.

The judge found that, at the time Mrs. Wheelwright executed the indenture, her place of residence and home were in England, but her political domicile was in Massachusetts. If the plaintiffs were entitled to maintain the action, judgment was to be entered for them for the sum named in the indenture, with interest; otherwise, judgment was to be entered for the defendant.

The case was argued at the bar in November, 1890, and afterward, in October, 1891, was submitted on the briefs to all the judges except Field, C.J., and Morton, J.

C. K. Cobb (*F. E. Brooks* with him) for the plaintiffs.

R. Codman, Jr., for the defendant.

HOLMES, J. This is an action on a voluntary covenant in an indenture under seal, executed by the defendant's testatrix in England, that her executors, within six months after her death, should pay to the plaintiffs, upon certain trusts, the sum of £2500, with interest at 4 per cent from the day of her death.

It is agreed that by the law of England such a covenant constitutes a debt of the covenantor legally chargeable upon his or her estate, ranking after debts for value, but before legacies. But it is contended by the defendant that a similar instrument executed here would be void. The testatrix died domiciled in Massachusetts, and the only question is whether the covenant can be enforced here. If a similar covenant made here would be enforced in our courts, the plaintiffs are entitled to recover, and in the view which we take on that question it is needless to examine with nicety how far the case is to be governed by the English law as to domestic covenants, and how far by that of Massachusetts.

In our opinion such a covenant as the present is not contrary to the policy of our laws, and could be enforced here if made in this State. If it were a contract upon valuable consideration, there is no doubt it would be binding. *Parker v. Coburn*, 10 Allen, 82. We presume that, in the absence of fraud, oppres-

sion, or unconscionableness, the courts would not inquire into the amount of such consideration. *Parish v. Stone*, 14 Pick. 198, 207. This being so, consideration is as much a form as a seal. It would be anomalous to say that a covenant in all other respects unquestionably valid and binding (*Comstock v. Son, ante*, 389, and *Mather v. Corliss*, 103 Mass. 568, 571) was void as contravening the policy of our Statute of Wills, but that a parol contract to do the same thing in consideration of a bushel of wheat was good. So, again, until lately an oral contract founded on a sufficient consideration to make a certain provision by will for a particular person was valid. *Wellington v. Apthorp*, 145 Mass. 69. Now, by statute, no agreement of that sort shall be binding unless such agreement is in writing, signed by the party whose executor is sought to be charged, or by an authorized agent. St. 1888, ch. 372. Again, it would be going a good way to say by construction that a covenant did not satisfy this statute.

The truth is, that the policy of the law requiring three witnesses to a will has little application to a contract. A will is an ambulatory instrument, the contents of which are not necessarily communicated to any one before the testator's death. It is this fact which makes witnesses peculiarly necessary to establish that the document offered for probate was executed by the testator as a final disposition of his property. But a contract which is put into the hands of the adverse party, and from which the contractor cannot withdraw, stands differently. See *Perry v. Cross*, 132 Mass. 454, 456-457. The moment it is admitted that some contracts which are to be performed after the testator's death are valid without three witnesses, a distinction based on the presence or absence of a valuable consideration becomes impossible with reference to the objection which we are considering. A formal instrument like the present, drawn up by lawyers and executed in the most solemn form known to the law, is less likely to be a vehicle for fraud than a parol contract based on a technical detriment to the promisee. Of course, we are not now speaking of the rank of such contracts *inter esse*. *Stone v. Gerrish*, 1 Allen, 175, cited by the defendant, contains some ambiguous expressions, but was decided on the ground that the instrument did not purport to be and was not a contract. *Cover v. Stem*, 67 Md. 449 was to like effect. The present instrument indisputably is a contract. It was drawn in English form by English lawyers, and must be construed by English law. So construed, it created a debt on a contingency from the covenantor herself, which if she had gone into bankruptcy would have been provable against her. *Ex parte Tindal*,

8 Bing. 402 ; S. C. 1 D. & Ch. 291, and Mont. 375, 462. Robson, Bankruptcy (5th ed.), 274. The cases of Parish *v.* Stone, 14 Pick. 198 and Warren *v.* Durfee, 126 Mass. 338, were actions on promissory notes, and were decided on the ground of a total or partial want of consideration.

There is no question here of any attempt to evade or defeat rights of third persons, which would have been paramount had the covenantor left the sum in question as a legacy by will. There is no ground for suggesting an intent to evade the provisions of our law regulating the execution of last wills, if such intent could be material when an otherwise binding contract was made. See Stone *v.* Hackett, 12 Gray, 227, 232-233. There was simply an intent to make a more binding and irrevocable provision than a legacy could be, and we see no reason why it should not succeed.

Judgment for the plaintiffs.

PART II.

OPERATION OF CONTRACTS.

CHAPTER III.

RIGHTS AND LIABILITIES OF THIRD PERSONS.¹

SECTION I.—BENEFICIARIES.

DUTTON AND WIFE *v.* POOLE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1677.

[*Reported in 2 Levinz 211.*]

ASSUMPSIT, and declares that the father of the plaintiff's wife being seized of a wood which he intended to sell to raise portions for younger children, the defendant being his heir, in consideration the father would forbear to sell it at his request, promised the father to pay his daughter, now the plaintiff's wife, £1000, and avers that the father at his request forbore, but the defendant had not paid the £1000. After verdict for the plaintiff upon *non assumpsit*, it was moved in arrest of judgment, that the action ought not to be brought by the daughter, but by the father; or if the father be dead, by his executors; for the promise was made to the father, and the daughter is neither privy nor interested in the consideration, nothing being due to her. Also the father, notwithstanding this agreement with the son, might have cut down the wood, and then there was no remedy for the son, nor could the daughter have released the promise, and therefore she cannot have an action against him for not performing the promise, and divers cases were cited for the defendant, as *Yelv. Rippon v. Norton*, *Hawes v. Leader*, *Starky v. Milner*, 1 Roll. 31, 32, Sty. 296, and a case lately resolved in Com. Banc. *inter Norris & Pine, intrat. Hill. 22 and 23 Car. 2, 1538*, where the case was, "If you will marry me, I will pay your children so much," and the action being brought by the children, adjudged it lay not. On the

¹ The cases relating to the doctrine of novation will be found *infra*.—ED.

other side it was said, if a man deliver goods or money to H. to deliver or pay to B., B. may have an action, because he is to have the benefit of the bailment, so here the daughter is to have the benefit of the promise. So if a man should say, "Give me a horse, I will give your son £10," the son may bring the action, because the gift was upon consideration of a profit to the son ; and the father is obliged by natural affection to provide for his children, for which cause affection to children is sufficient to raise a use to them out of the father's estate ; and therefore the daughter had an interest in the consideration and in the promise, and the son had a benefit by this agreement, for by this means he hath the wood and the daughter is without a portion, which otherwise in all probability the son would have been left to pay, if the wood had not been cut down, nor this agreement between him and his father, and for authorities of this side were cited 1 Roll. Ab. 31, *Oldman v. Bateman*, and *ibid.* 32 ; *Starky v. Meade*. Upon the first argument Wylde and Jones, JJ., seemed to think that the action ought to be brought by the father and his executors, though for the benefit of the daughter, and not by the daughter, being not privy to the promise or consideration. Twysden and Rainsford seemed *contra*, and afterward two new judges being made, *scil* Scroggs, C.J., in lieu of Rainsford, and Dolbin in lieu of Twysden, the case was argued again upon the reasons aforesaid ; and now Scroggs, C.J., said that there was such apparent consideration of affection from the father to his children, for whom nature obliges him to provide, that the consideration and promise to the father may well extend to the children, and he and Jones remembered the case of *Norris & Pine*, and that it was adjudged as aforesaid. But Scroggs said he was then and still is of opinion contrary to that judgment. Dolben, J., concurred with him that the daughter might bring the action, Jones & Wylde *hesitant*. But next day they also agreed to the opinion of the Chief Justice and Dolben, and so judgment was given for the plaintiff, for the son hath the benefit by having of the wood, and the daughter hath lost her portion by this means. And now Jones said he must confess he was never well satisfied with the judgment in *Norris & Pine's Case*, but being it was resolved, he was loth to give his opinion so suddenly against it. And note upon this judgment error was immediately brought, and Trin. 31 Car. 2 it was affirmed in the Exchequer Chamber.

JOHN PRICE *v.* EASTON.

IN THE KING'S BENCH, JANUARY 17, 1833.

[Reported in 4 *Barnewall & Adolphus* 433.]

DECLARATION stated that one William Price was indebted to the plaintiff in the sum of £13, being the balance of a larger sum due for the price of a certain timber carriage sold and delivered to him ; and that the defendant, in consideration thereof, and in consideration that the said William Price, at the request of the defendant, had undertaken and faithfully promised the defendant to work for him, the defendant, at certain wages agreed upon between them, and in consideration of William Price leaving the amount which might be earned by him in the defendant's hands, he, the defendant, undertook and promised to pay the plaintiff the sum of £13. Averment that William Price did work for the defendant, and earned a large sum of money, and left the same in his, defendant's hands. Breach, non-payment to the plaintiff of £13. Plea, *non assumpsit*. The plaintiff having obtained a verdict, a rule *nisi* was obtained by Campbell for arresting the judgment, on the ground that the plaintiff was a mere stranger to the consideration ; and he cited *Bourne v. Mason*,¹ and *Crow v. Rogers* ;² and distinguished the case from *Dutton v. Poole*,³ where tenant in fee-simple being about to cut down timber for his daughter's portion, the defendant, his heir at law, in consideration of his forbearing so to do, promised to pay a sum of money to the daughter, and the action by the husband of the daughter was held to be well brought ; but there, it was said, there was privity by blood, and the daughter was prejudiced by loss of her portion.

Justice now showed cause.

Campbell, Solicitor-General (*Talford* with him), *contra*, was stopped by the Court.

DENMAN, C.J. I think the declaration cannot be supported, as it does not show any consideration for the promise moving from the plaintiff to the defendant.

LITTLEDALE, J. No privity is shown between the plaintiff and defendant. This case is precisely like *Crow v. Rogers*,⁴ and must be governed by it.

TAUNTON, J. It is consistent with all the matter alleged in the declaration, that the plaintiff may have been entirely igno-

¹ 1 Vent. 6.² 1 Str. 592.³ 2 Lev. 210.⁴ 1 Str. 592.

rant of the arrangement between William Price and the defendant.

PATTESON, J. After verdict, the Court can only intend that all matters were proved which were requisite to support the allegations in the declaration, or what is necessarily to be implied from them. Now it is quite clear that the allegations in this declaration are not sufficient to show a right of action in the plaintiff. There is no promise to the plaintiff alleged. The rule for arresting the judgment must be made absolute.

Rule absolute.

SARAH MELLEN, ADMINISTRATRIX, v. SHILOMETH S. WHIPPLE.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH TERM, 1854.

[*Reported in 1 Gray 317.*]

ACTION of contract, brought by the administratrix of Michael Mellen, on December 20th, 1851. The declaration avers that "the defendant is indebted to the plaintiff for the following cause of action: On June 1st, 1844, one John M. Rollins, for a good and sufficient consideration, made and delivered to Charles Ellis and John M. Mayo (then partners under the firm of Ellis & Mayo) his note for the sum of \$500, payable to said Ellis & Mayo or order in three years from date, with interest thereon at the rate of 6 per cent per annum, payable semi-annually; and also made to said payees, to hold to themselves, their heirs and assigns, as security for the payment of said note, a mortgage deed of the same date, of a certain lot of land situated at the corner of Curve Street and Harrison Avenue in Boston, and more particularly described in said deeds. Said John M. Rollins afterward, to wit, on April 8th, 1845, by his deed of that date, conveyed the equity of redemption of said estate to Shilometh S. Whipple, the defendant; and said deed contained the following clause: 'The said granted premises are subject to a mortgage for \$500 with interest; said interest payable semi-annually; which mortgage, with the note for which it was given, the said Whipple is to assume and cancel.' Said Whipple accepted said deed, entered upon the said estate, and paid the interest on said note to the said mortgagees and their assigns to June 1st, 1848; and said Michael Mellen, the plaintiff's intestate, in his lifetime became, by regular assign-

ment, transfer, endorsement and delivery, for valuable consideration, possessed of said mortgage and the note for \$500 secured thereby ; and said Whipple became by law indebted to said intestate in the amount of said note ; and said Michael Mellen has since deceased, and the plaintiff was duly appointed administratrix of his estate ; and the said Whipple is now justly indebted to the plaintiff for the amount of said note of \$500 and interest thereon from June 1st, 1848 ; and promised the plaintiff to pay the same ; yet, though often requested, has not paid the same." To this declaration the defendant demurs, "and alleges and assigns for cause of this demurrer, that the declaration does not sufficiently set forth any legal cause of action."

Joel P. Bishop for the defendant.

E. F. Head for the plaintiff.

METCALF, J. According to the decisions in *Goodwin v. Gilbert*, 9 Mass. 510 ; *Pike v. Brown*, 7 Cush. 133, and some intermediate cases, the declaration now before us shows an agreement between Rollins and the defendant, for the non-performance of which Rollins might maintain an action. The question raised by this demurrer is, whether an action for the non-performance of that agreement can be maintained by the plaintiff.

The counsel for the plaintiff, in his brief, puts the case upon this ground : "On a promise not under seal, made by A. to B., for a good consideration, to pay B.'s debt to C., C. may sue A." Lord Holt, in *Yard v. Eland*, 1 Ld. Raym. 368, and Buller, J., in *Marchington v. Vernon*, 1 Bos. & Pul. 101, note, used nearly the same language ; and it has been transferred into various text-books, as if it were a general rule of law. But it is no more true, as a general rule, than another maxim, often found in the books, to wit, that a moral obligation is a sufficient consideration to support an express promise. Both maxims require great modification, because each expresses rather an exception to a general rule than the rule itself. And the needed modification of the latter maxim has been authoritatively made, and is now well understood. 3 Bos. & Pul. 249, note ; *Mills v. Wyman*, 3 Pick. 207 ; *Smith v. Ware*, 13 Johns. 259 ; 2 Greenl. Ev. § 107. But the limitations of the maxim on which the plaintiff relies are not so clearly established. By the recent decisions of the English courts its operation is restricted within narrower limits than formerly, and the general rule, to which it is an exception, is now more strictly enforced. That general rule is, and always has been, that a plaintiff, in an action on a simple contract, must be the person from whom the consideration of the contract actually moved, and that a stranger to the consideration cannot sue on the contract. The rule is some-

times thus expressed. There must be a privity of contract between the plaintiff and defendant, in order to render the defendant liable to an action by the plaintiff on the contract. *Crow v. Rogers*, 1 Stra. 592 ; *Ross v. Milne*, 12 Leigh, 204 ; *Morrison v. Beckey*, 6 Watts, 349 ; 1 Selw. N. P. (11th ed.) 49. The cases which form exceptions to this rule are included in the maxim on which the plaintiff attempts to support this action. We shall not undertake to classify all these exceptions which are found in the English and American decisions. It will be sufficient for the determination of this case to mention three distinct classes, which comprise all the cases on this point that have been decided in this commonwealth, and relied on by the plaintiff's counsel in argument.

1. *Indebitatus assumpsit* for money had and received can be maintained, in various instances, where there is no actual privity of contract between the plaintiff and defendant, and where the consideration does not move from the plaintiff. In some actions of this kind a recovery has been had, where the promise was to a third person for the benefit of the plaintiff ; such action being an equitable one that can be supported by showing that the defendant has in his hands money which, in equity and good conscience, belongs to the plaintiff, without showing a direct consideration moving from him, or a privity of contract between him and the defendant.

Most of the cases in this first class are those in which A. has put money or property into B.'s hands as a fund from which A.'s creditors are to be paid, and B. has promised, either expressly or by implication from his acceptance of the money or property without objection to the terms on which it was delivered to him, to pay such creditors. In such cases the creditors have maintained actions against the holder of the fund. *Disborn v. Denaby*, 1 D'Anv. Ab. 64 ; *Starkey v. Mill*, Style, 296 ; *Ellwood v. Monk*, 5 Wend. 235 ; *Delaware & Hudson Canal Co. v. Westchester County Bank*, 4 Denio, 97 ; *Fleming v. Alter*, 7 S. & R. 295 ; *Beers v. Robinson*, 9 Barr, 229. The cases in Massachusetts, which clearly fall into this class, are *Arnold v. Lyman*, 17 Mass. 400, recognized in *Fitch v. Chandler*, 4 Cush. 255 ; *Hall v. Marston*, 17 Mass. 575, and *Felch v. Taylor* 13, Pick. 133. On close examination the case of *Carnegie and Another v. Morrison and Another*, 2 Met. 381, will be found to belong to the same class. The Chief Justice there said : " Bradford was indebted to the plaintiffs, and was desirous of paying them. He had funds, either in cash or credit, with the defendants, and entered into a contract with them to pay a sum of money for him to the plaintiffs. And upon the

faith of that undertaking he forbore to adopt other measures to pay the plaintiffs' debt."

By the recent English decisions, however, one to whom money is transmitted, to be paid to a third person, is not liable to an action by that person, unless he has agreed to hold it for him. And such was the opinion of Spencer, J., in *Weston v. Barker*, 12 Johns. 282. See the English cases collected in 1 Archb. N. P. (Amer. ed. 1848) 121-125.

2. Cases where promises have been made to a father or uncle, for the benefit of a child or nephew, form a second class, in which the person for whose benefit the promise was made has maintained an action for the breach of it. The nearness of the relation between the promisee and him for whose benefit the promise was made, has been sometimes assigned as a reason for these decisions. And though different opinions, both as to the correctness of the decisions, and as to this reason for them, have often been expressed by English judges, yet the decisions themselves have never been overruled, but are still regarded as settled law. *Dutton v. Pool*, 1 Vent. 318 is a familiarly known case of this kind, in which the defendant promised a father, who was about to fell timber for the purpose of raising a portion for his daughter, that if he would forbear to fell it the defendant would pay the daughter £1000. The daughter maintained an action on this promise. Several like decisions had been previously made. *Rookwood's Case*, Cro. Eliz. 164; *Oldham v. Bateman*, 1 Rol. Ab. 31; *Provender v. Wood*, Hetl. 30; *Thomas's Case*, Style, 461; *Bell v. Chaplain*, Hardr. 321. These cases support the decision of this Court in *Felton v. Dickinson*, 10 Mass. 287.

3. The last case in this commonwealth, which was cited in support of the present action, is *Brewer v. Dyer*, 7 Cush. 337. In that case the defendant gave to the lessee of a shop a written promise to take the lease and pay to the lessor the rent, with the taxes, according to the terms of the lease. The defendant entered into possession of the shop with the knowledge of the lessor, and paid the rent to him for a year, and then left the shop. And it was decided that he was liable to the lessor for the subsequently accruing rent and for the taxes on his promise to the lessee.

Very clearly the case at bar is not within either of these classes of decisions. The defendant has no money which in equity and good conscience belongs to the plaintiff. No funds of Rollins's, either in money, property, or credit, have been put into the defendant's hands for the purpose of meeting the plaintiff's claim on Rollins. The sale of the equity of redemp-

tion to the defendant did not lessen the plaintiff's security for the mortgage debt which Rollins owed her intestate, for that equity could not have been taken toward payment of that debt. *Atkins v. Sawyer*, 1 Pick. 351. There was no nearness of relation between Rollins and the plaintiff's intestate. Nor has the defendant had the use and occupation of the land of the plaintiff or of her intestate under a promise or under any legal liability to pay rent for it.

The plaintiff's claim is not supported by any known decision of any court. It must, therefore, fall under the general rule of law already stated, and not within any exception to that rule. See 2 *Walford on Parties*, 1143-44; *Hammond on Parties*, 6-15. There was no privity of contract between the plaintiff's intestate and the defendant, nor did the consideration of the defendant's promise move from her intestate. Rollins sold only an equity of redemption to the defendant, leaving the estate in fee in the mortgagee. The stipulation in the deed of the equity, that the defendant should pay the mortgage notes, was a matter exclusively between the two parties to that deed, and is nothing more than the law would require of the defendant in order that he might derive any benefit from his purchase of the equity. The plaintiff still has the estate and also Rollins's personal responsibility to secure the mortgage debt.

We have not deemed it necessary or useful to examine the doctrine on which the plaintiff relies, any further than was required for the purpose of showing that neither the authorities cited by him nor any others that we can find sustain this action. And we have not inquired whether there is a difference in the application of that doctrine between an express promise by the defendant to Rollins, to pay the mortgage notes, and a promise by implication from the defendant's acceptance of the deed conveying the equity, but we have proceeded on an assumption that there is no such difference.

The declaration closes with an averment that the defendant became by law indebted to the plaintiff's intestate in the amount of the note for \$500, "and promised the plaintiff to pay the same." If this is to be taken, on demurrer, to be an express promise to the plaintiff, still it cannot help the case, because it was void for want of consideration.

Demurrer sustained.

LAWRENCE v. FOX.

IN THE COURT OF APPEALS OF NEW YORK, DECEMBER TERM,
1859.

[*Reported in 20 New York Reports 268.*]

APPEAL from the Superior Court of the city of Buffalo. On the trial before Masten, J., it appeared by the evidence of a bystander, that one Holly, in November, 1857, at the request of the defendant, loaned and advanced to him \$300, stating at the time that he owed that sum to the plaintiff for money borrowed of him, and had agreed to pay it to him the then next day; that the defendant in consideration thereof, at the time of receiving the money, promised to pay it to the plaintiff the then next day. Upon this state of facts the defendant moved for a nonsuit, upon three several grounds—viz.: That there was no proof tending to show that Holly was indebted to the plaintiff; that the agreement by the defendant with Holly to pay the plaintiff was void for want of consideration, and that there was no privity between the plaintiff and defendant. The Court overruled the motion, and the counsel for the defendant excepted. The cause was then submitted to the jury, and they found a verdict for the plaintiff for the amount of the loan and interest, \$344.66, upon which judgment was entered; from which the defendant appealed to the Superior Court, at general term, where the judgment was affirmed, and the defendant appealed to this Court. The cause was submitted on printed arguments.

I. S. Torrance for the appellant.

E. P. Chapin for the plaintiff.

H. GRAY, J. The first objection raised on the trial amounts to this, that the evidence of the person present, who heard the declarations of Holly giving directions as to the payment of the money he was then advancing to the defendant, was mere hearsay, and therefore not competent. Had the plaintiff sued Holly for this sum of money no objection to the competency of this evidence would have been thought of; and if the defendant had performed his promise by paying the sum loaned to him to the plaintiff, and Holly had afterward sued him for its recovery, and this evidence had been offered by the defendant, it would doubtless have been received without an objection from any source. All the defendant had the right to demand in this case was evidence which, as between Holly and the plaintiff, was

competent to establish the relation between them of debtor and creditor. For that purpose the evidence was clearly competent; it covered the whole ground and warranted the verdict of the jury. But it is claimed that notwithstanding this promise was established by competent evidence, it was void for the want of consideration. It is now more than a quarter of a century since it was settled by the Supreme Court of this State, in an able and painstaking opinion by the late Savage, C.J., in which the authorities were fully examined and carefully analyzed, that a promise in all material respects like the one under consideration was valid, and the judgment of that Court was unanimously affirmed by the Court for the Correction of Errors. *Farley v. Cleaveland*, 4 Cow. 432; same case in error, 9 Cow. 639. In that case one Moon owed Farley and sold to Cleaveland a quantity of hay, in consideration of which Cleaveland promised to pay Moon's debt to Farley; and the decision in favor of Farley's right to recover was placed upon the ground that the hay received by Cleaveland from Moon was a valid consideration for Cleaveland's promise to pay Farley, and that the subsisting liability of Moon to pay Farley was no objection to the recovery. The fact that the money advanced by Holly to the defendant was a loan to him for a day, and that it thereby became the property of the defendant, seemed to impress the defendant's counsel with the idea that because the defendant's promise was not a trust fund placed by the plaintiff in the defendant's hands, out of which he was to realize money as from the sale of a chattel or the collection of a debt, the promise although made for the benefit of the plaintiff could not inure to his benefit. The hay which Moon delivered to Cleaveland was not to be paid to Farley, but the debt incurred by Cleaveland for the purchase of the hay, like the debt incurred by the defendant for money borrowed, was what was to be paid. That case has been often referred to by the courts of this State, and has never been doubted as sound authority for the principle upheld by it. *Barker v. Bucklin*, 2 Denio, 45; *Hudson Canal Company v. The Westchester Bank*, 4 Denio, 97. It puts to rest the objection that the defendant's promise was void for want of consideration. The report of that case shows that the promise was not only made to Moon, but to the plaintiff Farley. In this case the promise was made to Holly, and not expressly to the plaintiff; and this difference between the two cases presents the question, raised by the defendant's objection, as to the want of privity between the plaintiff and defendant. As early as 1806 it was announced by the Supreme Court of this State, upon what was then regarded as the settled law of Eng-

land, "that where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it." *Schermerhorn v. Vanderheyden*, 1 John. R. 140 has often been reasserted by our courts and never departed from. The case of *Seaman v. White* has occasionally been referred to (but not by the courts), not only as having some bearing upon the question now under consideration, but as involving in doubt the soundness of the proposition stated in *Schermerhorn v. Vanderheyden*. In that case one Hill, on August 17th, 1835, made his note and procured it to be endorsed by Seaman and discounted by the Phoenix Bank. Before the note matured, and while it was owned by the Phoenix Bank, Hill placed in the hands of the defendant, Whitney, his draft accepted by a third party, which the defendant endorsed, and on October 7th, 1835, got discounted and placed the avails in the hands of an agent with which to take up Hill's note; the note became due, Whitney withdrew the avails of the draft from the hands of his agent and appropriated it to a debt due him from Hill, and Seaman paid the note endorsed by him and brought his suit against Whitney. Upon this state of facts appearing, it was held that Seaman could not recover, first, for the reason that no promise had been made by Whitney to pay; and, second, if a promise could be implied from the facts that Hill's accepted draft, with which to raise the means to pay the note had been placed by Hill in the hands of Whitney, the promise would not be to Seaman, but to the Phoenix Bank, who then owned the note; although in the course of the opinion of the Court it was stated that, in all cases the principle of which was sought to be applied to that case, the fund had been appropriated by an express undertaking of the defendant with the creditor. But before concluding the opinion of the Court in this case, the learned judge who delivered it conceded that an undertaking to pay the creditor may be implied from an arrangement to that effect between the defendant and the debtor. This question was subsequently, and in a case quite recent, again the subject of consideration by the Supreme Court, when it was held that in declaring upon a promise, made to the debtor by a third party to pay the creditor of the debtor, founded upon a consideration advanced by the debtor, it was unnecessary to aver a promise to the creditor; for the reason that upon proof of a promise made to the debtor to pay the creditor, a promise to the creditor would be implied. And in support of this proposition, in no respect distinguishable from the one now under consideration, the case of *Schermerhorn v. Vanderheyden*, with many intermediate cases in our courts, were cited, in which the

doctrine of that case was not only approved, but affirmed. The Delaware & Hudson Canal Company v. The Westchester County Bank, 4 Denio, 97. The same principle is adjudged in several cases in Massachusetts. I will refer to but few of them. Arnold v. Lyman, 17 Mass. 400; Hall v. Marston, 17 Mass. 575; Brewer v. Dyer, 7 Cush. 337, 340. In Hall v. Marston the Court say: "It seems to have been well settled that if A. promises B. for a valuable consideration to pay C., the latter may maintain *assumpsit* for the money;" and in Brewer v. Dyer, the recovery was upheld, as the Court said, "upon the principle of law long recognized and clearly established, that when one person, for a valuable consideration, engages with another, by a simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement; that it does not rest upon the ground of any actual or supposed relationship between the parties as some of the earlier cases would seem to indicate, but upon the broader and more satisfactory basis that the law operating on the act of the parties creates the duty, establishes a privity, and implies the promise and obligation on which the action is founded." There is a more recent case decided by the same Court, to which the defendant has referred and claims that it at least impairs the force of the former cases as authority. It is the case of Mellen v. Whipple, 1 Gray, 317. In that case one Rollins made his note for \$500 payable to Ellis & Mayo or order, and to secure its payment mortgaged to the payees a certain lot of ground, and then sold and conveyed the mortgaged premises to the defendant, by deed in which it was stated that the "granted premises were subject to a mortgage for \$500, which mortgage, with the note for which it was given, the said Whipple is to assume and cancel." The deed thus made was accepted by Whipple, the mortgage was afterward duly assigned, and the note endorsed by Ellis & Mayo to the plaintiff's intestate. After Whipple received the deed he paid to the mortgagees and their assigns the interest upon the mortgage and note for a time, and upon refusing to continue his payments was sued by the plaintiff as administratrix of the assignee of the mortgage and note. The Court held that the stipulation in the deed that Whipple should pay the mortgage and note was a matter exclusively between the two parties to the deed; that the sale by Rollins of the equity of redemption did not lessen the plaintiff's security, and that as nothing had been put into the defendant's hands for the purpose of meeting the plaintiff's claim on Rollins, there was no consideration to support an express promise, much less an implied one,

that Whipple should pay Mellen the amount of the note. This is all that was decided in that case, and the substance of the reasons assigned for the decision ; and whether the case was rightly disposed of or not, it has not in its facts any analogy to the case before us, nor do the reasons assigned for the decision bear in any degree upon the question we are now considering. But it is urged that because the defendant was not in any sense a trustee of the property of Holly for the benefit of the plaintiff, the law will not imply a promise. I agree that many of the cases where a promise was implied were cases of trusts, created for the benefit of the promisor. The case of *Felton v. Dickinson*, 10 Mass. 189-190, and others that might be cited, are of that class, but concede them all to have been cases of trusts, and it proves nothing against the application of the rule to this case. The duty of the trustee to pay the *cestuis que trust*, according to the terms of the trust, implies his promise to the latter to do so. In this case the defendant, upon ample consideration received from Holly, promised Holly to pay his debt to the plaintiff ; the consideration received and the promise to Holly made it as plainly his duty to pay the plaintiff as if the money had been remitted to him for that purpose, and as well implied a promise to do so as if he had been made a trustee of property to be converted into cash with which to pay. The fact that a breach of the duty imposed in the one case may be visited, and justly, with more serious consequences than in the other, by no means disproves the payment to be a duty in both. The principle illustrated by the example so frequently quoted (which concisely states the case in hand) "that a promise made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach," has been applied to trust cases, not because it was exclusively applicable to those cases, but because it was a principle of law, and as such applicable to those cases. It was also insisted that Holly could have discharged the defendant from his promise, though it was intended by both parties for the benefit of the plaintiff, and therefore the plaintiff was not entitled to maintain this suit for the recovery of a demand over which he had no control. It is enough that the plaintiff did not release the defendant from his promise, and whether he could or not is a question not now necessarily involved ; but if it was, I think it would be found difficult to maintain the right of Holly to discharge a judgment recovered by the plaintiff upon confession or otherwise, for the breach of the defendant's promise ; and if he could not, how could he discharge the suit before judgment, or the promise before suit, made as it was for the plaintiff's benefit and in

accordance with legal presumption accepted by him (*Berley v. Taylor*, 5 Hill, 577-584, *et seq.*), until his dissent was shown? The cases cited, and especially that of *Farley v. Cleaveland*, establish the validity of a parol promise; it stands then upon the footing of a written one. Suppose the defendant had given his note in which for value received of Holly he had promised to pay the plaintiff, and the plaintiff had accepted the promise retaining Holly's liability. Very clearly Holly could not have discharged that promise, be the right to release the defendant as it may. No one can doubt that he owes the sum of money demanded of him, or that in accordance with his promise it was his duty to have paid it to the plaintiff; nor can it be doubted that whatever may be the diversity of opinion elsewhere, the adjudications in this State, from a very early period, approved by experience, have established the defendant's liability; if, therefore, it could be shown that a more strict and technically accurate application of the rules applied would lead to a different result (which I by no means concede), the effort should not be made in the face of manifest justice.

The judgment should be affirmed.

JOHNSON, C.J., DENIO, SELDON, ALLEN and STRONG, JJ., concurred. JOHNSON, C.J., and DENIO, J., were of opinion that the promise was to be regarded as made to the plaintiff through the medium of his agent, whose action he could ratify when it came to his knowledge, though taken without his being privy thereto.

COMSTOCK, J. (Dissenting.) The plaintiff had nothing to do with the promise on which he brought this action. It was not made to him, nor did the consideration proceed from him. If he can maintain the suit, it is because an anomaly has found its way into the law on this subject. In general there must be privity of contract. The party who sues upon a promise must be the promisee, or he must have some legal interest in the undertaking. In this case it is plain that Holly, who loaned the money to the defendant, and to whom the promise in question was made, could at any time have claimed that it should be performed to himself personally. He had lent the money to the defendant, and at the same time directed the latter to pay the sum to the plaintiff. This direction he could countermand, and if he had done so, manifestly the defendant's promise to pay according to the direction would have ceased to exist. The plaintiff would receive a benefit by a complete execution of the arrangement, but the arrangement itself was between other parties, and was under their exclusive control. If the defendant had paid the money to Holly, his debt would

have been discharged thereby. So Holly might have released the demand or assigned it to another person, or the parties might have annulled the promise now in question, and designated some other creditor of Holly as the party to whom the money should be paid. It has never been claimed, that in a case thus situated, the right of a third person to sue upon the promise rested on any sound principle of law. We are to inquire whether the rule has been so established by positive authority.

The cases which have sometimes been supposed to have a bearing on this question are quite numerous. In some of them the dicta of judges, delivered upon very slight consideration, have been referred to as the decisions of the courts. Thus in *Schermerhorn v. Vanderheyden*, 1 John. 140, the Court is reported as saying: "We are of opinion that where one person makes a promise to another, for the benefit of a third person, that third person may maintain an action on such promise." This remark was made on the authority of *Dutton v. Poole*, Vent. 318, 332, decided in England nearly two hundred years ago. It was, however, but a mere remark, as the case was determined against the plaintiff on another ground. Yet this decision has often been referred to as authority for similar observations in later cases.

In another class of cases, which have been sometimes supposed to favor the doctrine, the promise was made to the person who brought the suit while the consideration proceeded from another, the question considered being whether the promise was void by the Statute of Frauds. Thus in *Gold v. Phillips*, 10 Johns. 412 one Wood was indebted to the plaintiffs for services as attorneys and counsel, and he conveyed a farm to the defendants who, as part of the consideration, were to pay that debt. Accordingly the defendants wrote to the plaintiffs, informing them that an arrangement had been made by which they were to pay the demand. The defence was that the promise was void within the statute, because, although in writing, it did not express the consideration. But the action was sustained on the ground that the undertaking was original and not collateral. So in the case of *Farley v. Cleaveland*, 4 Cow. 432; 9 Cow. 639, the facts proved or offered to be proved were that the plaintiff held a note against one Moon; that Moon sold hay to the defendant, who in consideration of that sale promised the plaintiff by parol to pay the note. The only question was whether the Statute of Frauds applied to the case. It was held by the Supreme Court, and afterward by the Court of Errors, that it did not. Such is also precisely the doctrine of *Ellwood v. Monk*, 5 Wend. 235, where it was held that a plea of

the Statute of Frauds to a count upon a promise of the defendant to the plaintiff, to pay the latter a debt owing to him by another person, the promise being founded on a sale of property to the defendant by the other person was bad.

The cases mentioned, and others of a like character were referred to by Jewett, J., in *Barker v. Bucklin*, 2 Denio, 45. In that case the learned justice considered at some length the question now before us. The authorities referred to were mainly those which I have cited and others upon the Statute of Frauds. The case decided nothing on the present subject, because it was determined against the plaintiff on a ground not involved in this discussion. The doctrine was certainly advanced which the plaintiff now contends for, but among all the decisions which were cited I do not think there is one standing directly upon it. The case of *Arnold v. Lyman*, 17 Mass. 400, might perhaps be regarded as an exception to this remark if a different interpretation had not been given to that decision in the Supreme Court of the same State where it was pronounced. In the recent case of *Mellen, Administratrix, v. Whipple*, 1 Gray, 317, that decision is understood as belonging to a class where the defendant has in his hands a trust fund, which was the foundation of the duty or promise in which the suit is brought.

The cases in which some trust was involved are also frequently referred to as authority for the doctrine now in question, but they do not sustain it. If A. delivers money or property to B., which the latter accepts upon a trust for the benefit of C., the latter can enforce the trust by an appropriate action for that purpose. *Berly v. Taylor*, 5 Hill, 577. If the trust be of money, I think the beneficiary may assent to it and bring the action for money had and received to his use. If it be of something else than money, the trustee must account for it according to the terms of the trust and upon principles of equity. There is some authority even for saying that an express promise founded on the possession of a trust fund may be enforced by an action at law in the name of the beneficiary, although it was made to the creator of the trust. Thus in *Comyn's Digest* (Action on the Case upon *Assumpsit*, B. 15), it is laid down that if a man promise a pig of lead to A., and his executor give lead to make a pig to B., who assumes to deliver it to A., an *assumpsit* lies by A. against him. The case of *The Delaware & Hudson Canal Company v. The Westchester County Bank*, 4 Denio, 97, involved a trust because the defendants had received from a third party a bill of exchange under an agreement that they would endeavor to collect it, and would pay over the proceeds when collected to the plaintiffs. A fund

received under such an agreement does not belong to the person who receives it. He must account for it specifically ; and perhaps there is no gross violation of principle in permitting the equitable owner of it to sue upon an express promise to pay it over. Having a specific interest in the thing, the undertaking to account for it may be regarded as in some sense made with him through the author of the trust. But further than this we cannot go without violating plain rules of law. In the case before us there was nothing in the nature of a trust or agency. The defendant borrowed the money of Holly and received it as his own. The plaintiff had no right in the fund, legal or equitable. The promise to repay the money created an obligation in favor of the lender to whom it was made and not in favor of any one else.

I have referred to the dictum in *Schermerhorn v. Vanderheyden*, 1 Johns. 140, as favoring the doctrine contended for. It was the earliest in this State, and was founded, as already observed, on the old English case of *Dutton v. Poole*, in *Ventriss*. That case has always been referred to as the ultimate authority whenever the rule in question has been mentioned, and it deserves, therefore, some further notice. The father of the plaintiff's wife being seized of certain lands, which afterward on his death descended to the defendant, and being about to cut £1000 worth of timber to raise a portion for his daughter, the defendant promised the father, in consideration of his forbearing to cut the timber, that he would pay the said daughter the £1000. After verdict for the plaintiff, upon the issue of *non assumpsit*, it was urged in arrest of judgment, that the father ought to have brought the action, and not the husband and wife. It was held, after much discussion, that the action would lie. The Court said : " It might be another case if the money had been to have been paid to a stranger, but there is such a nearness of relation between the father and the child, and it is a kind of debt to the child to be provided for, that the plaintiff is plainly concerned." We need not criticise the reason given for this decision. It is enough for the present purpose that the case is no authority for the general doctrine, to sustain which it has been so frequently cited. It belongs to a class of cases somewhat peculiar and anomalous, in which promises have been made to a parent or person standing in a near relationship to the person for whose benefit it was made, and in which, on account of that relationship, the beneficiary has been allowed to maintain the action. Regarded as standing on any other ground, they have long since ceased to be the law in England. Thus in *Crow v. Rogers*, 1 Strange, 592, one

Hardy was indebted to the plaintiff in the sum of £70, and upon a discourse between Hardy and the defendant, it was agreed that the defendant should pay that debt in consideration of a house to be conveyed by Hardy to him. The plaintiff brought the action on that promise, and *Dutton v. Poole* was cited in support of it. But it was held that the action would not lie, because the plaintiff was a stranger to the transaction. Again, in *Price v. Easton*, 4 Barn. & Adolph. 433, one William Price was indebted to the plaintiff in £13. The declaration averred a promise of the defendant to pay the debt in consideration that William Price would work for him and leave the wages in his hands, and that Price did work accordingly, and earned a large sum of money, which he left in the defendant's hands. After verdict for the plaintiff a motion was made in arrest of judgment, on the ground that the plaintiff was a stranger to the consideration. *Dutton v. Poole* and other cases of that class were cited in opposition to the motion, but the judgment was arrested. Lord Denman said: "I think the declaration cannot be supported, as it does not show any consideration for the promise moving from the plaintiff to the defendant." Little-*dale, J.*, said: "No privity is shown between the plaintiff and the defendant. The case is precisely like *Crow v. Rogers*, and must be governed by it." Taunton, *J.*, said: "It is consistent with all the matter alleged in the declaration that the plaintiff may have been entirely ignorant of the arrangement between William Price and the defendant." Patterson, *J.*, observed: "It is clear that the allegations do not show a right of action in the plaintiff. There is no promise to the plaintiff alleged." The same doctrine is recognized in *Lilly v. Hays*, 5 Ad. & Ellis, 548, and such is now the settled rule in England, although at an early day there was some obscurity arising out of the case of *Dutton v. Poole* and others of that peculiar class.

The question was also involved in some confusion by the earlier cases in Massachusetts. Indeed, the Supreme Court of that State seems at one time to have made a nearer approach to the doctrine on which this action must rest than the courts of this State have ever done. 10 Mass. 287; 17 Mass. 400. But in the recent case of *Mellen, Administratrix, v. Whipple*, 1 Gray, 317, the subject was carefully reviewed and the doctrine utterly overthrown. One Rollin was indebted to the plaintiff's testator, and had secured the debt by a mortgage on his land. He then conveyed the equity of redemption to the defendant by a deed which contained a clause declaring that the defendant was to assume and pay the mortgage. It was conceded that the acceptance of the deed with such a clause in it was equivalent

to an express promise to pay the mortgage debt, and the question was whether the mortgagee or his representative could sue on that undertaking. It was held that the suit could not be maintained, and in the course of a very careful and discriminating opinion by Metcalf, J., it was shown that the cases which had been supposed to favor the action belonged to exceptional classes, none of which embraced the pure and simple case of an attempt by one person to enforce a promise made to another from whom the consideration wholly proceeded. I am of that opinion.

The judgment of the Court below should therefore be reversed and a new trial granted.

GROVER, J., also dissented.

Judgment affirmed.

TWEDDLE v. ATKINSON, EXECUTOR OF GUY, DECEASED.

IN THE QUEEN'S BENCH, JUNE 7, 1861.

[*Reported in 1 Best & Smith 393.*]

THE declaration stated that the plaintiff was the son of John Tweddle, deceased, and before the making of the agreement hereafter mentioned, married the daughter of William Guy, deceased; and before the said marriage of the plaintiff the said William Guy, in consideration of the then intended marriage, promised the plaintiff to give to his said daughter a marriage portion, but the said promise was verbal, and at the time of the making of the said agreement had not been performed; and before the said marriage the said John Tweddle, in consideration of the said intended marriage, also verbally promised to give the plaintiff a marriage portion, which promise at the time of the making of the said agreement had not been performed. It then alleged that after the marriage and in the lifetime of the said William Guy, and of the said John Tweddle, they, the said William Guy and John Tweddle, entering into the agreement hereafter mentioned as a mode of giving effect to their said verbal promises; and the said William Guy also entering into the said agreement in order to provide for his said daughter a marriage portion, and to procure a further provision to be made by the said John Tweddle, by means of the said agreement, for his said daughter, and acting for the benefit of his said daughter; and the said John Tweddle also entering into the said agreement in order to provide for the plaintiff a

marriage portion, and to procure a further provision to be made by the said William Guy, by means of the said agreement, for the plaintiff, and acting for the benefit of the plaintiff ; they the said William Guy and John Tweddle made and entered into an agreement in writing in the words following—that is to say :

“ HIGH CONISCLIFFE, July 11, 1855.

“ Memorandum of an agreement made this day between William Guy, of, etc., of the one part, and John Tweddle, of, etc., of the other part. Whereas it is mutually agreed that the said William Guy shall and will pay the sum of £200 to William Tweddle, his son-in-law ; and the said John Tweddle, father to the aforesaid William Tweddle, shall and will pay the sum of £100 to the said William Tweddle, each and severally the said sums on or before August 21st, 1855. And it is hereby further agreed by the aforesaid William Guy and the said John Tweddle that the said William Tweddle has full power to sue the said parties in any court of law or equity for the aforesaid sums hereby promised and specified.

“ And the plaintiff says that afterward and before this suit, he and his said wife, who is still living, ratified and assented to the said agreement, and that he is the William Tweddle therein mentioned. And the plaintiff says that the said August 21st, 1855, A.D., elapsed, and all things have been done and happened necessary to entitle the plaintiff to have the said sum of £200 paid by the said William Guy or his executor, yet neither the said William Guy nor his executor has paid the same, and the same is in arrear and unpaid, contrary to the said agreement.”

Demurrer and joinder therein.

Edward James for the defendant.

Mellish for the plaintiff.

Edward James was not called upon to reply.

WIGHTMAN, J. Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration. The strongest of those cases is that cited in *Bourne v. Mason*, 1 Ventr. 6, in which it was held that the daughter of a physician might maintain *assumpsit* upon a promise to her father to give her a sum of money if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary, it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit.

CROMPTON, J. It is admitted that the plaintiff cannot succeed unless this case is an exception to the modern and well-established doctrine of the action of *assumpsit*. At the time when the cases which have been cited were decided the action of *assumpsit* was treated as an action of trespass upon the case, and therefore in the nature of a tort; and the law was not settled, as it now is, that natural love and affection is not a sufficient consideration for a promise upon which an action may be maintained; nor was it settled that the promisee cannot bring an action unless the consideration for the promise moved from him. The modern cases have, in effect, overruled the old decisions; they show that the consideration must move from the party entitled to sue upon the contract. It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued. It is said that the father in the present case was agent for the son in making the contract, but that argument ought also to make the son liable upon it. I am prepared to overrule the old decisions, and to hold that, by reason of the principles which now govern the action of *assumpsit*, the present action is not maintainable.

BLACKBURN, J. The earlier part of the declaration shows a contract which might be sued on, except for the enactment in § 4 of the Statute of Frauds, 29 Car. 2, ch. 3. The declaration then sets out a new contract, and the only point is whether, that contract being for the benefit of the children, they can sue upon it. Mellish admits that in general no action can be maintained upon a promise, unless the consideration moves from the party to whom it is made. But he says that there is an exception—namely, that when the consideration moves from a father, and the contract is for the benefit of his son, the natural love and affection between the father and son gives the son the right to sue as if the consideration had proceeded from himself. And Dutton and Wife v. Poole, 2 Lev. 210; 1 Vent. 318 was cited for this. We cannot overrule a decision of the Exchequer Chamber, but there is a distinct ground on which that case cannot be supported. The cases upon Stat. 27 El. ch. 4, which have decided that, by § 2, voluntary gifts by settlement after marriage are void against subsequent purchasers for value, and are not saved by § 4, show that natural love and affection are not a sufficient consideration whereon an action of *assumpsit* may be founded.

Judgment for the defendant.

CAMPBELL v. LACOCK.

IN THE SUPREME COURT OF PENNSYLVANIA, 1861.

[Reported in 40 Pennsylvania State Reports 448.]

ERROR to the District Court of Allegheny County.

This was an action on the case brought in the Court below by Nelson Campbell against H. Lacock, on a contract of guarantee.

The case was this. R. P. Getty and Samuel Geissinger were partners, carrying on the business of tavernkeeping in the Station Hotel, in the city of Allegheny, and on December 17th, 1856, dissolved partnership by Getty selling out his interest to Geissinger, on the latter agreeing to pay him therefor the sum of \$700, on or before January 1st, 1857, and make him a good and sufficient deed of a lot of ground in the borough of Birmingham, and "to pay all debts, dues, and demands against the late firm of Geissinger & Getty, and give good and sufficient security for the faithful performance of the same."

At the time of the signing and sealing of the foregoing agreement, and as security for the performance thereof, H. Lacock, the defendant, executed the following agreement in writing, endorsed thereon—viz.:

"I guarantee and hold myself responsible for the faithful performance, on the part of Samuel Geissinger, of the contract executed within."

The plaintiff's action was brought on this agreement to recover the amount owed him by Getty & Geissinger, as makers of a promissory note for the sum of \$500, dated October 8th, 1856, payable May 1st, 1857, to the order of Robert McCuen, and by him endorsed to the plaintiff before maturity. Suit had been brought thereon by the plaintiff against Getty & Geissinger to November Term, 1857, of this Court, and on October 15th, 1857, judgment rendered against them in favor of the plaintiff, for the sum of \$515.18, upon which execution was issued and returned "no goods." This action was then brought against the defendant, upon his refusal to pay the amount of Getty & Geissinger's indebtedness.

The declaration contained one special count setting forth the case as above stated, to which the defendant filed an affidavit of defence, setting forth that he owed said Nelson Campbell nothing except a small balance of \$19 for ale; had no dealings of the kind mentioned with him; that there is no privity of

contract between them ; that his only liability, if any exist by reason of his signing the paper referred to, is with said R. P. Getty ; that it was never understood or considered that defendant should be liable to strangers and persons not privy to said contract ; and that by reason of subsequent arrangements and contracts, he has a good defence against said Getty for all demands by reason of said contract and guarantee.

This was followed by a rule for judgment for want of a sufficient affidavit of defence, which on hearing was discharged ; whereupon the defendant pleaded *nil debet*, with leave to give in evidence the matter contained in his affidavit of defence.

On January 14th, 1861, the jury were sworn, and rendered their verdict in favor of the plaintiff for \$624.18, subject to the opinion of the Court upon the questions of law reserved.

On argument the Court below (Williams, J.) delivered the following opinion.

After stating the case briefly, the learned judge continued :

" The defendant is under no moral obligation to pay the debts of Getty & Geissinger, and if he is under a legal obligation, it arises out of his agreement as the surety of Geissinger. But the plaintiff was not a party to this agreement. The consideration did not move from him, and the promise was not made to him, or for his benefit. There is no privity of contract between the parties here. How then can the plaintiff maintain this action ? Where the promise is to one for the benefit of another, the decisions do not seem to be altogether uniform or reconcilable as to the party by whom the action should be brought.

" In some cases it has been held that he for whose benefit a promise is made may maintain an action on it, although no consideration pass from him to the defendant, nor any promise directly to him from the defendant. *Hind v. Holdship*, 2 Watts, 104. Upon the principle that one for whose use and benefit a promise is made, if upon sufficient consideration, may maintain an action on it, it was held in *Beers v. Robinson*, 9 Barr, 229, that where A. promises B. to pay B.'s debts, so far as the consideration received would go, the creditor of B. may maintain an action on the promise. And to the same effect are *Vincent v. Watson*, 6 Harris, 96 ; *Bell v. Fagely*, 7 Harris, 273 ; and *Arer's Appeal*, 4 Casey, 179. A distinction is taken in *Blymire v. Boistle*, 6 Watts, 182, and the rule is there laid down, that if one receive money from another for the use of a third person, or having money belonging to another, agree with that other to pay it to a third, action lies by the person beneficially interested. But where the contract is for the benefit of the contract-

ing party, and the third person is a stranger to the contract and consideration, the action must be by the promisee. This distinction is recognized and approved by Kennedy, J., in *De Bolle v. Pennsylvania Insurance Company*, 4 Wh. 74, and *Hubbert v. Borden*, 6 Wh. 94.

"The case in *Blymire v. Boistle* was this. Boistle had a judgment against Gladstone, which Blymire agreed with Gladstone to pay, in consideration that the latter would convey to him a lot of ground. Gladstone conveyed the lot, but Blymire did not pay the judgment according to his agreement, and Boistle brought suit against him. And the question was, whether the action was rightly brought. It was held that the action should have been brought in the name of Gladstone, the contracting party for whose benefit the agreement was made, and not in the name of Boistle, who was a stranger to the contract and consideration.

"It is suggested by Rogers, J., in *Esling v. Zantzing*, 1 Harris, 50, that the decision would have been different if Boistle had participated in the contract—that is, if the three had met together, and Blymire had expressly promised Boistle to pay the judgment. And accordingly it was held in *Esling v. Zantzing*, that where a landlord gave a creditor an order on his tenant to pay the creditor the rent as it became due, which was accepted by the tenant, that a liability by the tenant in favor of the creditor was thereby created, which could be enforced by an action in the name of the creditor, and that the tenant's liability to the action was grounded not merely on the extinguishment of his liability to the landlord, but mainly on the express promise, for which there was a sufficient consideration. In reference to *Blymire v. Boistle*, and other cases relied on by the defendant to defeat the action in that case, the learned judge says: 'In all of these the privity of contract, which is indispensable to the maintenance of the suit in the name of the original creditor, is wanting.' The decision in *Finney v. Finney*, 4 Harris, 380, is put expressly on the ground of the want of privity of contract between the parties, and for this reason it was there held that the plaintiff was not entitled to recover, though the Court, from the manifest unfairness of the defendant's conduct in withholding the fund from all parties, was anxious to sustain the action.

"The case of *The Commercial Bank v. Wood*, 7 W. & S. 89, falls clearly within the distinction taken in *Blymire v. Boistle*, though, in delivering the opinion of the Court, Kennedy, J., seems to lay stress on the fact that the plaintiffs subsequently assented to the arrangement made by their debtor with the

bank for the payment of the note held by them. The arrangement was this. The bank received from Piatt, the agent of McCoy, as cash, a draft drawn by the Commercial & Railroad Bank of Vicksburg on the Girard Bank of Philadelphia, and agreed with him to pay McCoy's note, held by the plaintiffs, Wood & Abbott; and in an action on this promise it was held that the plaintiffs were entitled to recover. The decision is put mainly on the ground that the bank, having taken the draft as money, received it in trust for the plaintiffs, and McCoy's indebtedness to them was a sufficient consideration for the creation and support of the trust thus created in their favor, and the right to the use of the money passed thereby to them, so as to entitle them to demand and receive it from the bank. Perhaps the true reason, if there be one, for the distinction is here indicated—viz., where the promisor receives the fund, or other consideration of the promise in trust for a third party, there the action may be in the name of the latter. But, with the exception hereafter noticed, in all other cases the action must be brought in the name of him from whom the consideration moved, or who was the meritorious cause of it, whether, as in *Blymire v. Boistle*, *Ramsdale v. Horton*, 3 Barr, 330, and other like cases, the promise be made to him from whom the consideration moved, or, as in *Edmondson v. Penney*, 1 Barr, 334, and *Comfort v. Eisenbies*, 1 Jones, 13, it be made to a stranger to the consideration. The exception to the rule is in the case of an express promise, upon a sufficient consideration, to pay a third party, where the latter participates in the contract; and in such case, as we have seen in *Esling v. Zantzinger*, the action may be maintained, by reason of the privity of contract, in the name of the third party.

“In *Morrison v. Berkey*, 6 Watts, 349, a case somewhat resembling the present, Morrison agreed with Vickroy to pay a debt, due by the firm of which Vickroy was a member, for which Berkey was surety. Berkey paid the debt, and sued Morrison on his agreement; and it was held that, being a stranger to the consideration, as between Morrison and Vickroy, Berkey could not recover. So also in *Cummings v. Klapp*, 5 W. & S. 511, it is ruled that a promise to a constable to pay the amount of an execution in his hands can only be enforced by an action in the name of the constable who gave the indulgence, and from whom, therefore, the consideration moved, to whom the promise was made, and who was the party beneficially interested therein, and not in the name of the plaintiff in the execution, who was a stranger to the contract and consideration.

“In none of the cases to which reference has been made is

there any rule laid down which will enable the plaintiff to maintain this action, and a careful examination induces the belief that none can be found in our reports. The promise was not made to the plaintiff, or for his use and benefit. The consideration did not move from him, the defendant has received nothing in trust for him, and there is no privity of contract whatever between the parties.

“ But if there could be any doubt as to the right of the plaintiff to maintain an action on defendant's contract for his own use, it is clear that the suit must be brought in the name of Getty, the contracting party. And that this is not a mere technical objection is shown in *Berkey v. Morrison*, because, in that form of suit, the defendant will have the benefit of any defence which he may have against Getty. For these reasons we are clearly of the opinion that upon the reserved question judgment should be entered in favor of the defendant.”

The plaintiff thereupon sued out this writ, and assigned for error the entry of judgment in favor of defendant.

S. H. Geyer for plaintiff in error.

Barton, for defendant in error, furnished no printed argument.

The opinion of the Court was delivered November 4th, 1861.

Per CURIAM. This judgment seems to us fully justified by the opinion of the learned judge of the Court below, and we do not repeat his argument. And we do not consider that this decision conflicts with cases deciding that an action lies in favor of the creditor when there is a promise directly to him, 6 Harris, 96, or where his debtors were partners and had dissolved partnership, and he sues only those who continue the business, and have agreed to pay the partnership debts. 7 Harris, 273.

Judgment affirmed.

JOHN KELLY, SHERIFF OF NEW YORK, RESPONDENT, v.
MORRIS ROBERTS, JR., APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, JUNE 12, 1869.

[*Reported in 40 New York Reports 432.*]

APPEAL from the judgment of the Supreme Court in the first district, affirming a judgment for the plaintiff upon the report of a referee.

The action was brought under § 232 of the Code, by the plaintiff, as sheriff of the county of New York, holding an

attachment against the property of Everett & Jones, to recover the amount of a debt alleged to be due from the defendant to them.

The referee, to whom the cause was referred, reported, among other matters, not material to the questions discussed in the opinion, the following facts and conclusions :

That on or about March 29th, 1861, A.D., the defendant purchased from Thomas R. Everett and Robert O. Jones (then composing the copartnership firm of Everett & Jones), all the goods, stock, and property owned by them in the store then occupied by them, known as No. 284 Fulton Street, in the city of Brooklyn, at and for the rate of 30 per cent of the actual cost thereof.

That the said Everett & Jones and the said defendant, on the said March 29th, executed, under their hands and seals, an agreement for the said sale in the words and figures following, to wit :

“ Agreement this day made between Thomas R. Everett and Robert O. Jones, both of the city of Brooklyn, State of New York, and doing business in said city of Brooklyn, under the firm name of Everett & Jones, of the first part, and Morris Roberts, Jr., of the city of New York and State aforesaid, of the second part, witnesseth as follows :

“ The said parties of the first part, in consideration of the sum of \$1 to them in hand paid, and in consideration of the covenant hereinafter contained on the part of the party of the second part, hereby grant, sell, assign, transfer and set over to the said party of the second part, all the goods, stock, and property now owned and belonging to the parties of the first part, and in the store now and heretofore occupied by the said parties of the first part, and known as No. 284 Fulton Street, in said city of Brooklyn, to have and to hold the same unto the said party of the second part, his heirs, executors, administrators and assigns forever ; and the said party of the second part, in consideration of the foregoing, hereby agrees to pay unto the said parties of the first part, at and after the rate of 30 per cent upon the actual costs of said goods, property and stock.

“ And it is hereby mutually agreed that, for the purpose of arriving at the amount which the said party of the second part is to pay unto the said parties of the first part, in pursuance of this agreement, an inventory shall forthwith be taken of said goods, stock, and property, by the parties to these presents, which said inventory shall specify the actual costs of the respective articles of property hereby sold to the party of the sec-

ond part, and upon the completion of said inventory, the same shall be annexed to this instrument, and marked schedule A.

"In witness whereof the parties to these presents have hereunto set their hands and seals, the 29th day of March, in the year 1861.

"THOMAS R. EVERETT, [L. S.]

"ROBERT O. JONES, [L. S.]

"MORRIS ROBERTS, JR., [L. S.]"

The actual costs of the said goods, stock, and property was \$9000, and the sum found (upon ascertaining such costs) to be payable by the said defendant was \$2700.

It was verbally agreed between the aforesaid parties that the consideration for the said purchase should be paid by the said defendant in the following manner :

. . . That he should use a portion of the purchase-money by paying to certain parties then composing the mercantile firm of Cummings, Simpson & Armstrong, a promissory note for \$400, then held by the last-named firm, and which was made by the said firm of Everett & Jones, and was payable in the month of April then next.

That he should use a further portion of the purchase-money by paying to certain parties then composing the mercantile firm of Arnold, Constable & Company a promissory note of \$300, then held by the last-named firm, and which was made by the said firm of Everett & Jones, and was payable in the month of May then next.

And he was, by such agreement, to retain in his hands the money requisite for the payment of the said notes, and pay the same at the maturity thereof. . . .

That on April 13th, 1861, on the application of William M. Bliss, William A. Wheelock, Austin H. Kelly, and Edward Merritt, plaintiffs, a warrant of attachment was issued out of the Supreme Court, by and under the hand of the Hon. T. W. Clerke, one of the justices of the said Court, against the property of the said Thomas R. Everett and Robert O. Jones

Which said warrant was on the same day delivered to John Kelly, the sheriff of the city and county of New York, to be executed.

That on April 14th, 1861, the said sheriff, by one of his deputies, served the said warrant of attachment on the defendant herein, by delivering to the said defendant herein a copy of the said warrant of attachment, together with a notice endorsed thereon, in the words and figures following—that is to say :

"I hereby certify the within to be a true copy of the original

warrant of attachment as served by me in this suit, and that the attachment, of which the within is a copy, is now in my hands, and that in it I am commanded to attach and safely keep all the estate, real and personal, of the said Thomas R. Everett and Robert O. Jones, the within named debtors, within my county (except such articles as are by law exempt from execution), with all books of accounts, vouchers, and papers relating thereto; and that all such property and effects, rights and shares of stock, with interest thereon, and dividends therefrom, and the debts and credits of the said Thomas R. Everett and Robert O. Jones, the within named debtors, now in your possession, or under your control are, or which may come into your possession, or under your control, will be liable to said warrant of attachment. And you are hereby required to deliver all such property, etc., into my custody without delay, with a certificate thereof.

“Dated New York, April 13th, 1861.

“Yours, etc.,

“JOHN KELLY,

“*Sheriff of the City and County of New York.*

“H. CROMBIE,

“*Deputy Sheriff.*

“TO MORRIS ROBERTS, Jr., Esq., 181 Eighth Avenue.”

That the said sheriff, by his deputy, at the same time demanded of the said Roberts (the defendant herein) a certificate of what property belonging to the said defendants in the attachment (Thomas R. Everett and Robert O. Jones), or either of them, he had in his possession, or under his control, and of any debts due or owing from him to either or both of said defendants (last named), and the said Roberts neglected and refused to give to the said sheriff any certificate thereof.

That thereupon, on April 26th, 1861, an order was obtained, upon the application of the aforesaid plaintiffs in attachment, under the hand of the Hon. George G. Barnard, one of the justices of the said Supreme Court, requiring the defendant herein (Morris Roberts, Jr.) to appear before the said justice to be examined on oath, concerning any property belonging to the said Everett & Jones, or either of them, held by him, and concerning any debts owing by him to the said Everett & Jones, or either of them.

In pursuance of which said order the said defendant herein appeared before the said justice, and on May 11th, 1861, was examined touching the matters in the said order referred to.

And after such examination, on May 18th, 1861, the said

sheriff of the city and county of New York, by his deputy, served the said warrant of attachment again upon defendant herein, by delivering to him a copy thereof, with a notice thereon endorsed, dated May 13th, 1861, in the same words and figures as the said notice before served, as above set forth, save only that there was added to such further notice these words—viz.: “Particularly the sum of \$1200, or thereabouts, belonging to the said debtors, now in your hands, with a certificate thereof.”

And, thereafter, on June 28th, 1861, this action was commenced. . . .

I further find that the aforesaid firms of Cummings, Simpson & Armstrong and Arnold, Constable & Company have not been, nor have either of them been, notified of the aforesaid agreement between the said Everett & Jones and the defendant in respect to the payment of a portion of the purchase-money for the aforesaid goods to them respectively.

That they have not, nor have either of said firms, in any manner, assented to the provisions so made for such payment, nor required such payment from the said Roberts.

That the said Roberts has never paid to them, or either of them the moneys so agreed to be paid to them, nor any part thereof, and has never promised or agreed with them or with either of them to make such payment. . . .

I do further find that the amount due to William M. Bliss, William A. Wheelock, Austin A. Kelly, and Edward Merritt, the plaintiffs in the said attachment, and mentioned therein, and in the pleadings in this action, and for the satisfaction of which the said attachment was issued, is \$496.15, with interest from February 17th, 1861, which interest is \$44.77, and that the sheriff's poundage and fees upon said attachment amount (so far as they appear from any facts shown on the trial hereof or admitted in the pleadings herein) to the sum of \$12.40; which said last-mentioned three sums amount to \$554.32, and that no other costs or expenses incurred by the said sheriff, or by the aforesaid plaintiffs, in the said attachment, were in any manner proved or made to appear on the trial hereof.

My conclusions of law from the aforesaid facts are :

* * * * *

Third. In respect to the sum of \$700; residue of the consideration of the said purchase, and which it was agreed he should pay to the said firms of Cummings, Simpson & Armstrong and Arnold, Constable & Company.

1. That the said firms last mentioned acquired no such title to the said payment, and the defendant incurred no such liabil-

ity to them, as will avail to defeat the claim of the plaintiff in this action, to recover the same as the money of Everett & Jones. . . . 3. That subject to the right of the plaintiff herein to recover, to the extent of such sum as is sufficient to satisfy the aforesaid demand of the said plaintiffs in the said attachment, with the interest, together with the costs and expenses, the defendant in this action is entitled to have and retain the said sum, and is not liable therefore to the aforesaid defendants in the attachment (Everett & Jones), and that, therefore, the recovery of the plaintiffs in this action should be limited to the sum required to satisfy the said demand of the plaintiffs in the said attachment, with the interests, costs, and expenses aforesaid.

I do, therefore, find, determine, and decide that the plaintiff in this action is entitled to recover from the defendant herein the aforesaid amount of \$554.32, and also to recover his costs of this suit; and that the said plaintiff have judgment against the said defendant accordingly.

John Graham and Reynolds for appellant.

Prentiss & Flanders for respondent.

JAMES, J. Had the debtors and the defendant Roberts made it a condition of the sale of the goods of the former to the latter, that the defendant should pay a designated part of the consideration of the sale to Arnold, Constable & Company, and a part to Cummings, Simpson & Armstrong, the cases of *Berly v. Taylor*, 5 Hill, 533; *Williams v. Fitch*, 18 N. Y. 546; *Lawrence v. Fox*, 20 N. Y. 268; *Gridley v. Gridley*, 24 N. Y. 130; and *Lowry v. Steward*, 25 N. Y. 239, would seem to warrant the proposition that a trust was created for the benefit of those two firms, which they might affirm and enforce, and that a suit in equity would lie in their favor for that purpose. And those and other cases in this State affirm the more general proposition, that where a promise is made upon a valid consideration to one person for the benefit of another, the latter may maintain an action thereon. See above cases, and the *Delaware & Hudson Canal Company v. Westchester County Bank*, 4 Denio, 97; *Dingeldien v. Third Avenue R. R. Co.*, 37 N. Y. 575, and cases cited.

But here the sale of the goods was consummated by a transfer thereof, under the hands and seals of the parties thereto, and the covenant by the defendant was express to pay the price to the vendors, Everett & Jones. On the completion of the inventory the precise relation between the defendant and Everett & Jones was that the latter were creditors of the defendant to the amount of the purchase-money. There was no trust and

no condition annexed to the sale. The defendant owed Everett & Jones the price of the goods.

The question presented therefore by this case is whether a verbal agreement between creditor and debtor, upon no new consideration, that instead of paying the debt to the creditor, the debtor will pay it to a third person, the debtor himself having no interest in the question to whom the money shall be paid, is final and irrevocable by the creditor, although such third person has given no assent thereto, nor received any notice of such agreement. It is not enough to claim in answer to this question, that the third person, on receiving notice thereof, may accept the promise and sue thereon, the original creditor still assenting. Cases which hold that if money be paid to A. to be paid over to B., the latter may sue for and recover the same, as money had and received to his use by A. do not answer this question.

It would be a very liberal extension of these cases if it should be held that if A. hand money to his own servant or agent, with instructions to carry and deliver it to B., which the servant or agent agrees to do, such instructions are irrevocable, and although A. should change his mind before his agent or servant sets out on his errand, he could not countermand the instructions and take back his money. Until such instructions have been acted upon in some manner, the servant continues servant of A., and only his servant. So where one hands money to his servant, agent, or friend, with a request that he visit the city and therewith pay a note due or about to become due, can it be seriously questioned that, if before anything further is done, such one concludes to use the money for some other purpose, or to pay some other debt, he may do so? I think not. And the cases above referred to do not hold the contrary nor anything like it.

Privity of contract was once deemed of some importance in testing the right of one who sought to enforce an agreement; and, although where a trust has been created for the benefit of a third person assented to by him, it has been held to create an implied contract in equity or at law, according to circumstances, and to be irrevocable, the mere agreement of third persons, without consideration, not acted upon by either, nor communicated to him in whose apparent favor it is made, is as much the subject of revocation or release as if the latter was not named therein. The present case, however, is not one of trust or delivery of money or property to one to be paid or delivered to another; it is not, therefore, necessary to open or discuss the question whether, in the cases supposed, an assent

of the third person is to be presumed, or whether he has an indefeasible right to accept and sue for the benefit.

The proof and the report of the referee in this case do not, in terms, state the time when the parol agreement by the defendant to pay the debt due Arnold, Constable & Company and others was made. It would seem to have been not only after the actual assignment and the covenant by the defendant to pay Everett & Jones therefor, but at or after the taking of the inventory and the ascertainment thereby of the amount which, by such covenant, the defendant was bound to pay, upon which the amounts were apportioned and his notes for so much as he gave notes for were made.

But the inquiry for the precise date is not material, for if the verbal agreement be assumed to have been prior to or contemporaneous with the written covenant under the hand and seal of the defendant, Roberts, to pay the amount of the purchase-money to Everett & Jones, then the rule that all prior or contemporaneous parol negotiations and agreements are merged in the written instrument forbids its operation. Such negotiations and agreements cannot be permitted to control the covenant. If Everett & Jones had sued the defendant upon that covenant for the price of the goods, he could not defend by proof of such prior or contemporaneous parol agreement. He would be debtor to them according to the terms of his covenant, and his debt to them was subject to attachment. ✓

If, on the other hand, it be assumed that after the making of the covenant and the ascertainment of the price, the vendors and the defendant agreed that a part of the price should be paid to Arnold, Constable & Company and others to satisfy debts of the vendors, the case is not altered; this did not constitute a delivery of money or property to the defendant to be paid to others. There was no trust, no acceptance of anything to create what has been in some cases deemed an agency for such others. It was purely and simply an executory contract without consideration to pay what the defendant owes Everett & Jones to their creditors. This was in effect a license; if he paid it, very well, he would thereby have satisfied so much of his debt to Everett & Jones.

The simple inquiry whether if a creditor directs his debtor to pay his note to a third person, and he assents, such creditor can revoke the direction, has never been decided in the negative, and I think it cannot be so decided on any principle.

There is no trust; there is no new consideration; such debtor has no interest in the appropriation. If in reliance on the instruction he pays or places himself in any new position, then

indeed he is protected. But while nothing is done the debt he owes is the property of the creditor.

Suppose, for example, the debtor having received **such a** direction and agreed thereto, nevertheless neglects to **pay to** any one. Can it be doubted that the original creditor could maintain an action for the original debt? It would be a good defence that he had paid it to a third person pursuant to **such an agreement**, but the mere agreement unperformed and not acted upon at all would be no defence.¹

In this case Roberts had done nothing, he had not performed the agreement, or acted in any manner on the license he therefore still remained debtor to Everett & Jones as he was before the verbal agreement was made.

If these views are correct, then the debt due from the defendant, when the attachment was issued in favor of creditors of

¹ It is admitted by the pleadings, and was neither controverted nor sought to be, by either party at the trial, that, at the time the agreement sued on was entered into between plaintiff and defendant, the former was indebted to the State in a certain sum for stumpage on the logs so sold by him to defendant, and that, as part of the stipulated purchase price, defendant, by the terms of the agreement, promised the plaintiff to pay the amount of his said debt to the State, within a specified time therein named; and, though such time of payment had passed, the debt had not been paid by either party, but remained due and unpaid when the action was brought. Upon these facts, it was claimed by the defendant in his answer, and insisted on at the trial, as a defence, that the plaintiff could maintain no action upon a breach of this stipulation of the defendant, until he had first paid the debt himself; because, under the rule laid down by this Court in *Sanders v. Clason*, 13 Minn. 379, the defendant was legally holden to the State upon such his promise to the plaintiff. The refusal of the Court so to charge the jury upon this branch of the case is assigned as error in this Court.

The defendant's undertaking was not one of indemnity. It was an affirmative, unconditional promise to the plaintiff, upon a valid consideration, to pay, within a specified time, a definite sum of money to a third party—the State—for his benefit. Though, within the doctrine of the New York cases upon this subject, as well as our own, the State might have maintained an action against defendant upon a breach of its agreement, it is well settled, both upon principle and authority, that the defendant also remained liable to plaintiff, upon its promise, by privity of contract; and a cause of action accrued in favor of the latter, which became complete immediately upon its breach by the failure of the defendant to make the payment at the stipulated time. It is not necessary for the promisee in such a case to discharge the debt before asserting his right of action against the promisor, growing out of the breach of his own agreement. The measure of damages in a case of this kind is the amount of the debt agreed to be paid. The ruling of the Court below, therefore, upon this subject was correct. *Port v. Jackson*, 17 John. 239; s. c., *Jackson v. Port*, 17 John. 479; *Matter of Negus*, 7 Wend. 499; *Thomas v. Allen*, 1 Hill, 145; *Churchill v. Hunt*, 3 Denio, 321; *Wicker v. Hoppock*, 6 Wall. 94.—*Cornell, J., Merriam v. Pine City Lumber Co.*, 23 Minn. 314, 322–323.—ED.

Everett & Jones, was a debt due as matter of law to them, and the attachment was operative.

I think the service of the attachment sufficiently identified it, and that the judgment herein should be affirmed.

GROVER, WOODRUFF, MASON, JJ., were for affirmance on the ground stated in opinion of JAMES, J. LOTT, J., was also for affirmance, on the ground that the fair inference from the report was that the verbal agreement was made at the same time with the bill of sale, and therefore merged into it and was void.

HUNT, C.J., and DANIELS, J., were for reversal.

Judgment affirmed.

CHARLES W. VROOMAN, GUARDIAN, ETC., RESPONDENT, v.
HARRIET B. TURNER, IMPEADED, ETC., APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, APRIL 20, 1877.

[*Reported in 69 New York Reports 280.*]

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 8 Hun, 78.)

This was an action to foreclose a mortgage.

The mortgage was executed in August, 1873, by defendant Evans, who then owned the mortgaged premises. He conveyed the same to one Mitchell, and through various *mesne* conveyances the title came to one Sanborn. In none of these conveyances did the grantee assume to pay the mortgage. Sanborn conveyed the same to defendant Harriet B. Turner, by deed which contained a clause stating that the conveyance was subject to the mortgage, "which mortgage the party hereto of the second part hereby covenants and agrees to pay off and discharge, the same forming part of the consideration thereof."

The referee found that said grantee, by so assuming payment of the mortgage, became personally liable therefor, and directed judgment against her for any deficiency. Judgment was entered accordingly.

Edward T. Bartlett for the appellant.

N. H. Clement for the respondent.

ALLEN, J. The precise question presented by the appeal in this action has been twice before the courts of this State, and received the same solution in each. It first arose in *King v. Whitely*, 10 Paige, 465, decided in 1843. There the grantor of

an equity of redemption in mortgaged premises, neither legally nor equitably interested in the payment of the bond and mortgage except so far as the same were a charge upon his interest in the lands, conveyed the lands subject to the mortgage, and the conveyance recited that the grantees therein assumed the mortgage, and were to pay off the same as a part of the consideration of such conveyance, and it was held that as the grantor in that conveyance was not personally liable to the holder of the mortgage to pay the same, the grantees were not liable to the holder of such mortgage for the deficiency upon a foreclosure and sale of the mortgaged premises. It was conceded by the chancellor that if the grantor had been personally liable to the holder of the mortgage for the payment of the mortgage debt, the holder of such mortgage would have been entitled in equity to the benefit of the agreement recited in such conveyance, to pay off the mortgage and to a decree over against the grantees for the deficiency. This would have been in accordance with a well-established rule in equity, which gives to the creditor the right of subrogation to and the benefit of any security held by a surety for the reinforcement of the principal debt, and in the case supposed, and by force of the agreement recited in the conveyance, the grantee would have become the principal debtor, and the grantor would be a *quasi* surety for the payment of the mortgage debt. *Halsey v. Reed*, 9 Paige, 446 ; *Curtis v. Tyler*, 9 Paige, 432 ; *Burr v. Beers*, 24 N. Y. 178.

King v. Whitely was followed, and the same rule applied by an undivided court in *Trotter v. Hughes*, 12 N. Y. 74, and the same case was cited with approval in *Garnsey v. Rogers*, 47 N. Y. 233.

The clause in the conveyance in *Trotter v. Hughes* was not in terms precisely like that in *King v. Whitely*, or in the grant under consideration. The undertaking by the grantees to pay the mortgage debt as recited, was not in express terms or as explicit as in the other conveyances. But the recital was, I think, sufficient to justify the inference of a promise to pay the debt, and so it must have been regarded by the Court. The case was not distinguished by the Court in any of its circumstances from *King v. Whitely*, but was supposed to be on all fours with and governed by it. Had the grantor in that case been personally bound for the payment of the debt, I am of the opinion that an action would have been sustained against the grantee upon a promise implied from the terms of the grant accepted by him to pay it and indemnify the grantor. It must have been so regarded by this Court, otherwise no question would have been made upon it, and the Court would not have

so seriously and ably fortified and applied the doctrine of *King v. Whitely*. A single suggestion that there was no undertaking by the grantee and no personal liability for the payment of the debt assumed by him, would have disposed of the claim to charge him for the deficiency upon the sale of the mortgaged premises. The rule which exempts the grantee of mortgaged premises subject to a mortgage, the payment of which is assumed in consideration of the conveyance as between him and his grantor, from liability to the holder of the mortgage when the grantee is not bound in law or equity for the payment of the mortgage, is founded in reason and principle, and is not inconsistent with that class of cases in which it has been held that a promise to one for the benefit of a third party may avail to give an action directly to the latter against the promisor, of which *Lawrence v. Fox*, 20 N. Y. 268, is a prominent example. To give a third party who may derive a benefit from the performance of the promise an action, there must be, first, an intent by the promisee to secure some benefit to the third party; and, second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise or an equivalent from him personally.

It is true there need be no privity between the promisor and the party claiming the benefit of the undertaking, neither is it necessary that the latter should be privy to the consideration of the promise, but it does not follow that a mere volunteer can avail himself of it. A legal obligation or duty of the promisee to him will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise, the obligation of the promisee furnishing an evidence of the intent of the latter to benefit him, and creating a privity by substitution with the promisor. A mere stranger cannot intervene and claim by action the benefit of a contract between other parties. There must be either a new consideration or some prior right or claim against one of the contracting parties by which he has a legal interest in the performance of the agreement.

It is said in *Garnsey v. Rodgers*, 47 N. Y. 233, that it is not every promise made by one person to another from the performance of which a third person would derive a benefit that gives a right of action to such third person, he being privy neither to the contract nor the consideration. In the language of Rapallo, J., "to entitle him to an action, the contract must have been made for his benefit. He must be the party intended to be

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benefited." See also *Turk v. Ridge*, 41 N. Y. 201, and *Merrill v. Green*, 55 N. Y. 270, in which, under similar agreements, third parties sought to maintain an action upon engagements by the performance of which they would be benefited, but to which they were not parties and failed. The courts are not inclined to extend the doctrine of *Lawrence v. Fox* to cases not clearly within the principle of that decision. Judges have differed as to the principle upon which *Lawrence v. Fox* and kindred cases rest, but in every case in which an action has been sustained there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise. Whether the decisions rest upon the doctrine of agency, the promisee being regarded as the agent for the third party, who, by bringing his action adopts his acts, or upon the doctrine of a trust the promisor being regarded as having received money or other thing for the third party is not material. In either case there must be a legal right, founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit.

In *Lawrence v. Fox* a prominent question was made *in limine*, whether the debt from Halley to the plaintiff was sufficiently proved by the confession of Halley made at the time of the loan of the money to the defendant. It was assumed that if there was no debt proved the action would not lie, and the declaration of Halley the debtor was held sufficient evidence of the debt. Gray, J., said: "All the defendant had the right to demand in this case was evidence which as between Halley and the plaintiff was competent to establish the relation between them of debtor and creditor." In *Burr v. Beers*, 24 N. Y. 178, and *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253, the grantor of the defendant was personally liable to pay the mortgage to the plaintiff, and the cases were therefore clearly within the principle of *Lawrence v. Fox*, *Halsey v. Reed*, and *Curtis v. Tyler*, *supra*. See also *Bosworth, J., Doolittle v. Naylor*, 2 Bos. 225; and *Ford v. David*, 1 Bos. 569. It is claimed that *King v. Whitely* and the cases following it were overruled by *Lawrence v. Fox*. But it is very clear that it was not the intention to overrule them, and that the cases are not inconsistent. The doctrine of *Lawrence v. Fox*, although questioned and criticised, was not first adopted in this State by the decision of that case. It was expressly adjudged as early as 1825 in *Farley v. Cleveland*, 4 Cow. 432, affirmed in the Court for the correction of errors in 1827, *per totam curiam*, and reported in 9 Cow. 639. The chancellor was not ignorant of these decisions when he decided *King v. Whitely*, nor was Denio, J., and his associates

unaware of them when *Trotter v. Hughes* was decided, and Gray, J., in *Lawrence v. Fox* says the case of *Farley v. Cleveland* had never been doubted.

The Court below erred in giving judgment against the appellant for the deficiency after the sale of the mortgaged premises, and so much of the judgment as directs her to pay the same must be reversed with costs.

All concur except EARL, J., dissenting.

Judgment accordingly.

NATIONAL BANK *v.* GRAND LODGE.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1878.

[*Reported in 98 United States Reports 123.*]

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

This is an action by the Second National Bank of St. Louis, Mo., against the Grand Lodge of Missouri of Free and Accepted Ancient Masons, to compel the payment of certain coupons formerly attached to bonds issued in June, 1869, by the Masonic Hall Association, a corporation existing under the laws of the State of Missouri, in relation to which bonds the Grand Lodge, October 14th, 1869, adopted the following resolution :

“ *Resolved*, That this Grand Lodge assume the payment of the \$200,000 bonds, issued by the Masonic Hall Association, provided that stock is issued to the Grand Lodge by said association to the amount of said assumption of payment by this Grand Lodge as the said bonds are paid.”

The Court below instructed the jury that independently of the question of the power of the Grand Lodge to pass the resolution, it was no foundation for the present action, and directed a verdict for the defendant.

The jury returned a verdict in accordance with the direction of the Court, and judgment having been entered thereon, the plaintiff sued out this writ of error.

John C. Orrick for the plaintiff in error.

John D. S. Dryden, *contra*.

STRONG, J., delivered the opinion of the Court.

It is unnecessary to consider the several assignments of error in detail, for there is an insurmountable difficulty in the way of

the plaintiff's recovery. The resolution of the Grand Lodge was but a proposition made to the Masonic Hall Association, and, when accepted, the resolution and acceptance constituted at most only an executory contract *inter partes*. It was a contract made for the benefit of the association and of the Grand Lodge—made that the latter might acquire the ownership of stock of the former, and that the former might obtain relief from its liabilities. The holders of the bonds were not parties to it, and there was no privity between them and the lodge. They may have had an indirect interest in the performance of the undertakings of the parties, as they would have in an agreement by which the lodge should undertake to lend money to the association, or contract to buy its stock to enable it to pay its debts; but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names. We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and defendant is necessary to the maintenance of an action of *assumpsit*. The subject has been much debated, and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets, than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue. His case is not an exception from the general rule that privity of contract is required. There are some other exceptions recognized, but they are unimportant now. The plaintiff's case is within none of them. Nor is he sole beneficiary of the contract between the association and the Grand Lodge. The contract was made, as we have said, for the benefit of the association, and if enforce-

able at all, is enforceable by it. That the several bondholders of the association are not in a situation to sue upon it is apparent on its face. Even as between the association and the Grand Lodge, the latter was not bound to pay anything except so far as stock of the former was delivered or tendered to it. The promise to pay and the promise to deliver the stock were not independent of each other. They were concurrent and dependent. Of this there can be no doubt. The resolution of the lodge was to assume the payment of the \$200,000 bonds, issued by the association, "*Provided*, that stock is issued to the Grand Lodge by said association to the amount of said assumption," . . . "as said bonds are paid." Certainly the obligation of the lodge was made contingent upon the issue of the stock, and the consideration for payment of the debt to the bondholders was the receipt of the stock. But the bondholders can neither deliver it nor tender it; nor can they compel the association to deliver it. If they can sue upon the contract, and enforce payment by the Grand Lodge of the bonds, the contract is wholly changed, and the lodge is compelled to pay whether it gets the stock or not. To this it cannot be presumed the lodge would ever have agreed. It is manifest, therefore, that the bondholders of the association are not in such privity with the lodge, and have no such interest in the contract as to warrant their bringing suit in their own names.

Hence the present action cannot be sustained, and the Circuit Court correctly directed a verdict for the defendant.

Judgment affirmed.

DAVIS v. THE CLINTON WATER WORKS COMPANY.

IN THE SUPREME COURT OF IOWA, JUNE 15, 1880.

[*Reported in 54 Iowa 59.*]

ACTION at law to recover the value of certain buildings destroyed by fire, upon the ground that defendant was bound by contract with the city of Clinton to supply water to be used in extinguishing fires and failed to perform its obligation in this respect, which resulted in the destruction of plaintiff's property. A demurrer to the petition was overruled, and defendant appeals from the decision upon the demurrer.

E. S. Bailey and Wright, Gatch & Wright for appellant.

J. S. Darling and A. R. Cotton for appellee.

BECK, J. I. The petition alleges that the defendant entered into a contract with the city of Clinton to supply water to be

used by the city for the purpose of extinguishing fires. The contract is embodied in an ordinance passed by the city authorizing defendant to establish its works for supplying water to the city, and providing for compensation to be paid defendant by the city for water furnished for public purposes, including the extinguishing of fires. The terms and conditions of this contract need not be recited. It is sufficient to state that the parties thereto were the city and the defendant, and the plaintiff in this case in no sense was a party to the contract. The power of the city to pass the ordinance and enter into the contract is not questioned.

The petition alleges that a fire occurred in certain store-rooms owned by plaintiff in the city, and they were entirely consumed for the reason that the necessary supply of water was not furnished by defendant, and a sufficient pressure of water was not found at the hydrants contiguous to the buildings, which was caused by defective machinery and the negligence of defendant's servants, all of which was in violation of defendant's contracts under said ordinance of the city. A demurrer to the petition was overruled.

II. The only question presented in the case is this one, Is the defendant liable to plaintiff upon the contract embodied in the ordinance?

The petition does not allege or show any privity of contract between plaintiff and defendant. The plaintiff is a stranger, and the mere fact that she may find benefits therefrom by the protection of her property, in common with all other persons whose property is similarly situated, does not make her a party to the contract, or create a privity between her and defendant.

It is a rule of law, familiar to the profession, that a privity of contract must exist between the parties to an action upon a contract. One whom the law regards as a stranger to the contract cannot maintain an action thereon. The rule is founded upon the plainest reasons. The contracting parties control all interests, and are entitled to all rights secured by the contract. If mere strangers may enforce the contract by actions, on the ground of benefits flowing therefrom to them, there would be no certain limit to the number and character of actions which would be brought thereon. Exceptions to this rule exist, which must not be regarded as abrogating the rule itself. Thus, if one under a contract receives goods or property to which another, not a party to the contract, is entitled, he may maintain an action therefor. So the sole beneficiary of a contract may maintain an action to recover property or money to which he is entitled thereunder. In these cases the law implies a promise

on the part of the one holding the money or property to account therefor to the beneficiary. Other exceptions to the rule, resting upon similar principles, may exist. See *National Bank v. Grand Lodge*, 98 U. S. 123.

The case before us is not an exception to the rule we have stated. The city, in exercise of its lawful authority, to protect the property of the people, may cause water to be supplied for extinguishing fires and for other objects demanded by the wants of the people. In the exercise of this authority it contracts with defendant to supply the water demanded for these purposes. The plaintiff received benefits from the water thus supplied in common with all the people of the city. These benefits she receives just as she does other benefits from the municipal government, as the benefits enjoyed on account of improved streets, peace, and order enforced by police regulation and the like.

It cannot be claimed that the agents or officers of the city employed by the municipal government to supply water, improve the streets, or maintain good order, are liable to a citizen for loss or damage sustained by reason of the failure to perform their duties and obligations in this respect. They are employed by the city, and responsible alone to the city. The people must trust to the municipal government to enforce the discharge of duties and obligations by the officers and agents of that government. They cannot hold such officers and agents liable upon the contracts between them and the city.

These views and conclusions are supported by the following authorities : *Atkenson v. New Castle & Gateshead Water Works Co.*, L. R., 2 Exch. Div. 441 ; *Nickerson v. Bridgeport Hydraulic Co.* (January, 1878), 46 Conn. 24 ; *Vrooman v. Turner*, 69 N. Y. 280 ; *Wharton on Negligence*, §§ 438, 439, 440 ; *Shearman & Redfield on Negligence*, § 54.

The cases cited by counsel for plaintiff, we think, are not in conflict with the view we have above expressed.

III. Counsel for defendant base an argument upon the position that the city itself would not be liable to defendant in case it owned and operated the water works. They argue that the defendant, therefore, would not be liable to plaintiff. We find it unnecessary to consider the argument or the premise upon which it is based. We are content to rest our conclusion upon the grounds and arguments we have attempted to present.

The Circuit Court erred in overruling the demurrer to plaintiff's petition. Its judgment is, therefore, reversed.

WEARE C. LITTLE ET AL., RESPONDENTS, v. A. BLEECKER
BANKS, APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, MAY 3, 1881.

[*Reported in 85 New York Reports 258.*]

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 13th, 1880, affirming a judgment in favor of plaintiff, entered upon a decision of the Court on trial without a jury. (Reported below, 20 Hun, 143.)

The nature of the action and the facts are sufficiently stated in the opinion.

Rufus W. Peckham for appellant.

E. Countryman for respondents.

MILLER, J. This action was brought to recover damages sustained by the plaintiffs, as law-book-sellers, for an alleged refusal of the defendant to sell and deliver to them certain copies of the volumes of the New York Reports published by the defendant. The contract of the defendant with the State officers who were authorized to make the same provided, among other things, that the defendant should at all times keep the volumes published for sale at retail, at the price named, in one or more law-book-stores in the city of Albany and the city of New York, and it declared: "And should any other law-book-seller in either of said cities apply to purchase any of said volumes, the same shall be supplied to such law-book-seller upon application, in quantities not exceeding one hundred copies to each applicant, unless said party of the second part shall choose to deliver a greater number when applied for, which he shall be at liberty to do, and the said party of the second part shall thereupon, at intervals not exceeding ten days, furnish the said law-book-sellers copies of any of said volumes when required, in quantities not exceeding fifty volumes at a time." It also provided that "the said volumes shall be published and kept for sale as aforesaid, at the price of \$1.10 per copy, and shall be simultaneously placed on sale in each of said book-stores in the cities of New York and Albany, and as to the time when copies of said volumes, or any of them, may be purchased, there shall be no discrimination in favor of or against any person desiring to purchase the same, but they shall be supplied to all alike in the manner hereinabove provided." The contract further de-

clared that the State officers should be at liberty to abrogate and annul the same for any default or failure to fulfil, and for a breach of any of its terms or conditions the defendant should forfeit and pay to the people of the State the sum of \$5000, which was "agreed upon, not as a penalty, but as fixed, stipulated, and liquidated damages suffered by the people aforesaid, to be sued for and recovered by the attorney-general . . . in the name and for the benefit of the said people." It was also further agreed that for any failure on the part of the defendant "to keep on sale, furnish and deliver the aforesaid volumes, or any of them, at the price and as hereinabove provided," the defendant "shall forfeit and pay . . . the sum of \$100, hereby fixed and agreed upon, not as a penalty but as the liquidated damages suffered by the person or persons aggrieved thereby, the same to be sued for and recovered by the person or persons so aggrieved." The plaintiffs applied on six different occasions for copies of some of the volumes published at the book-store of the defendant, and demanded the same, and the defendant refused to furnish the same, and the plaintiffs bring this action for six different sums of \$100 each by reason of such refusals.

The effect of the contract was that, in consideration of doing the work, the defendant would sell and deliver the books, as provided, to the persons who were entitled thereto, and if he failed to do so as required, when demanded, he would pay, to the person injured, the damages. The rule is well settled by the decisions of the courts of this State, that an agreement made for a valid consideration by one party with another to pay money to a third can be enforced by such third person in his own name. *Lawrence v. Fox*, 20 N. Y. 268; *Coster v. The Mayor*, 43 N. Y. 399; 52 Barb. 276; *French v. Donaldson*, 57 N. Y. 496; 5 Lans. 293. Contractors with the State, who assume, for a consideration received from the sovereign power, by covenant, express or implied, to do certain things, are liable, in case of neglect to perform such covenant, to a private action at the suit of the party injured by such neglect, and such contract inures to the benefit of the individual who is interested in its performance. *Weet v. Vil. of Brockport*, 16 N. Y. 161, note; *Robinson v. Chamberlain*, 34 N. Y. 389; *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 648; *Johnson v. Belden*, 47 N. Y. 130; *City of Brooklyn v. Brooklyn City R. R. Co.*, 47 N. Y. 476; *McMahon v. Second Ave. R. R. Co.*, 75 N. Y. 231; *Conroy v. Gale*, 5 Lans. 344. The ground upon which these decisions are founded is a broad principle of public policy essential to the public welfare (34 N. Y., *supra*), and we are unable to perceive why the doctrine last stated, without invoking the rule laid

down in *Lawrence v. Fox* (*supra*), is not applicable to a contract of the description of the one in controversy, where the officers enter into it for the advantage and the welfare of the public, and where such a provision constitutes a material portion of the agreement which is essential to carry it into effect. Within some of the adjudications in this State already cited, if the plaintiffs have been injured by a violation of such a contract, no reason exists why an action would not lie on their behalf against the defendant for the recovery of damages. See also *Arnold v. Nichols*, 64 N. Y. 117; *Claffin v. Ostrom*, 54 N. Y. 581.

We have given due consideration to the criticism of the learned counsel for the appellant upon the decisions referred to, but we are unable to discover any such distinction between some of the cases cited and the one at bar, as would authorize a holding that the State officers had no authority to make a contract for the benefit of the plaintiffs, and others who desired to purchase the reports, which would authorize an action to recover damages in favor of a party injured by a failure to perform. The plaintiffs certainly had a special interest in the contract, which was provided for, and it is difficult to see why they had not the same remedy as in the cases cited, where provision has been made for the benefit of a third person which entitled such person to maintain an action for a breach of the contract.

The judgment was right, and should be affirmed.

All concur except RAPALLO, J., absent, and ANDREWS, J., not voting.

Judgment affirmed.

JOSEPHINE TODD, RESPONDENT, *v.* ALBERT WEBER
ET AL., EXECUTORS, ETC., APPELLANTS.

IN THE COURT OF APPEALS OF NEW YORK, FEBRUARY 26, 1884.

[*Reported in 95 New York Reports 181.*]

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made March 22d, 1883, which reversed a judgment in favor of defendants, entered upon the report of a referee.

The nature of the action and the material facts are stated in the opinion.

Robert S. Green for appellants.

William H. Arnoux for respondent.

DANFORTH, J. The complaint is twofold: First, that the defendant's testator, the father of the plaintiff, although not the husband of her mother, being applied to by Margaret Voris, Francis A. Knapp, Hester A. Knapp, and Louisa A. Story to provide for the plaintiff, promised them that he would pay for her maintenance, support, and education, by making due and sufficient provision for her by his last will, in consideration that they would support her during the term of his natural life; avers that these persons were relatives of the plaintiff's mother, and that upon this promise they maintained, cared for, educated and supported the plaintiff up to June 25th, 1879, when the testator died.

Second, a promise by the testator to the plaintiff, and other persons acting in her behalf, that he would support and maintain her so long as she should live.

The testator made no provision for the plaintiff by will or otherwise.

These promises were denied by the defendants, and the referee, to whom the issues were referred, found against the plaintiff, because in his opinion no legal claim had been established, lamenting at the same time "that the simplicity and ingenuousness of the plaintiff and her witnesses"—the persons above referred to—"had been practised upon." On appeal to the General Term that Court held that the plaintiff might recover upon the first cause of action, but as to the second, that no case was made out; reversed the judgment which had followed the report of the referee and ordered a new trial. From that order the defendants appealed to this Court, assenting that if the order should be affirmed, judgment absolute should be rendered against them. (Code, § 191.)

If I am right in these conclusions there is before us a valid contract made between the testator and the several persons named for the benefit of the plaintiff. The only remaining question is one of parties—who should bring the action for its enforcement.¹ As she had the sole beneficial interest in the contract, it was, we think, properly brought in her name. This would seem plain enough upon principle, but it is also well-established by authority. In *Dutton and Wife v. Poole*, 2 Levinz, 210, decided in the time of Charles II., a son promised his father, upon a consideration moving from him, to pay his daughter £1000. Upon default the daughter sued. After verdict for the plaintiff it was argued in arrest of judgment that the action should have been by the father, not the daughter, for the promise, it was said, was made to the father, and the

¹ Only so much of the opinion is given as relates to this question.—Ed.

daughter was neither privy nor interested in the consideration, nothing being due to her. The Court seemed to hesitate, but after more than one hearing and citation by counsel of cases *pro* and *con*, it was held in favor of the plaintiff, the Chief Justice saying that there was such apparent consideration of affection from the father to his children, for whom nature obliges him to provide, that the consideration and promise to the father may well extend to the children, and the judgment then given was, on error brought, affirmed in the Exchequer Chamber.

A century later Lord Mansfield, in *Martin v. Hind*, Cowper 437-443, referring to *Dutton v. Poole* (*supra*), said: "It was matter of surprise how a doubt could have arisen in that case."

A few years after (1806) a similar question came before the Supreme Court of this State, in *Schermerhorn v. Vanderheyden*, 1 Johns. 139, where the facts were that in consideration of one J. C., the father of the plaintiff's wife, assigning to the defendant certain personal property, the latter promised to purchase for the daughter a cherry desk. He failed to do so, and for that breach the action was brought by the husband of the daughter, he suing in her right. It was objected that no action could be maintained by the plaintiff on the promise made to J. C.; but the Court held otherwise, saying: "Where one person makes a promise to another for the benefit of a third person, that third person may maintain an action on such promise," citing *Dutton v. Poole* (*supra*), and saying the same principle has since that time been repeatedly sanctioned by the decisions of the English courts.

A different rule is said to prevail in those tribunals at the present time (per Wightman, J., in *Tweddle v. Atkinson*, 1 Best & Smith, Q. B. 393; 101 Eng. Com. Law R. 393), and there even in equity the doctrine of the earlier cases may be considered as unsettled. Pollock's *Principles of Contract*, 196. But in this State it has, I believe, been uniformly adhered to. In 1817 it seems to have been approved by Kent, C. *Cumberland v. Codrington*, 3 Johns. ch. 254. The question came directly before him in 1823, and it was answered in the same way upon the principle asserted in *Dutton v. Poole* (*supra*), and the learned chancellor held that where a father conveyed land to his son on his covenanting to pay an annuity to his mother during her widowhood, she might maintain an action on the covenant so made for her benefit (*Shepard v. Shepard*, 7 J. Ch. 56), and in 1845 his successor says it has been the settled law from the time of the decision of the case of *Dutton v. Poole* (*supra*), down to the then present time, that a party for whose

benefit a promise is made may sue in *assumpsit* upon such promise, although the consideration for such promise was a consideration between the promisor and a third person.

Such also was the conclusion of the late Supreme Court of this State after a full examination of the authorities in *Barker v. Bucklin*, 2 Denio, 45. Also by the present Supreme Court in 1859 in *Judson v. Gray*, affirmed by this Court (17 How. Pr. 289). In *Burr v. Beers*, 24 N. Y. 178, the judgment was in terms supported upon as was said, "the broad principle that if one person make a promise to another for the benefit of a third person, that third person may maintain an action on the promise," and Denio, J., after a review of the authorities, said: "We must regard the point as definitely settled so far as the courts of this State are concerned." It seems unnecessary to follow the line of authorities further. The plaintiff is within the rule. The contract upon which she sues was made for her benefit as its object. It is the doctrine of the first and last case that she may enforce it. This conclusion is also in harmony with the general current of authority. In the Supreme Court of the United States *Hendrick v. Lindsay*, 93 U. S. Rep. (3 Otto) 143, it is said: "The right of a party to maintain *assumpsit* on a promise not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country." This conclusion makes it unnecessary to consider the ground on which the Court below held that a partial recovery could be had in this case.

It may be conceded that if the plaintiff had not outlived the testator, no action at all would lie, for that she should, of the two, be the longest liver was one of the conditions upon which his promise was made. He died first. The condition then was fulfilled. The plaintiff is, therefore, entitled to recover of the defendants the amount found by the referee to have been paid, laid out and expended for her by her relatives, as above stated, together with interest from the death of the testator.

The order of the General Term should, therefore, be affirmed, and judgment absolute ordered for the plaintiff with costs.

All concur except ANDREWS, J., who dissents.

Order affirmed and judgment accordingly.

GEORGE P. BAY v. SIMEON B. WILLIAMS.

IN THE SUPREME COURT OF ILLINOIS, NOVEMBER 17, 1884.

[Reported in 112 Illinois Reports 91.]

APPEAL from the Appellate Court for the First District, heard in that Court on appeal from the Circuit Court of Cook County, the Hon. George Gardner, J., presiding.

John Woodbridge for the appellant.

Dent, Black & Cratty Bros. for the appellee.

WALKER, J., delivered the opinion of the Court :

It appears from the record in this case that Mrs. Camelia J. Williams, on March 11th, 1873, sold to Newman & Sissons forty acres of land lying several miles south of the city of Chicago for the sum of \$12,000, and after deducting the advanced payment, took their promissory notes payable in instalments. To secure the deferred payments they executed to Thomas Dent a trust deed on the property, containing the usual powers conferred by such instruments. Appellant, on September 8th of the same year, purchased the land of Newman & Sissons for the consideration named in their warranty deed, of \$24,000. Their deed contained an express promise on the part of appellant to pay and discharge the debt secured by the trust deed on the land in favor of Mrs. Williams. The provision is in this language : "Which said notes for principal and interest said party (George P. Bay) expressly agrees to pay." Appellant afterward, on October 7th, 1878, applied to Sissons, and he, for the expressed consideration of \$1 and other sufficient considerations, released appellant from this obligation. Appellant also applied to Newman, who had asked to be discharged from his debts in bankruptcy, for a similar release, but he declined to give it. Newman subsequently obtained his discharge in bankruptcy. Mrs. Williams, on November 5th, 1879, filed this bill to foreclose her mortgage, and on a hearing, on May 27th, 1881, she recovered a decree of foreclosure. The master sold the land, and it was bid off by her at \$12,525, which left \$3559.46 unpaid on the decree. Afterward, on September 12th, 1883, the Court found that appellant had assumed to pay the debt secured by the trust deed, and thereby became personally liable for the deficiency, and decreed that an execution issue for the unpaid balance of the decree. He appealed to the Appellate Court for the First District, where, on a hearing, the decree of

the lower Court was affirmed, and the case comes to this Court by another appeal.

The question presented for determination is whether the Court below erred in rendering this supplemental decree awarding execution against appellant.

It is next urged that admitting the doctrine to be correct, appellant was absolved from all liability by Sissons' release, and cases are cited to the effect that the mortgagor may release his grantee from his promise to pay the debt of the mortgagee at any time before such mortgagee brings suit to enforce the promise.¹ The cases referred to proceed upon the grounds that the promise of the grantee is made to his grantor, and not to the mortgagee, and that the latter has no interest in the promise until he assents to and relies upon the promise, and such acceptance is manifested by bringing suit to enforce the promise; or they proceed, in other cases, upon the theory that by relying on or accepting the promise of the grantee to the mortgagor, the mortgagee releases the mortgagor, and accepts his grantee as his debtor; and there is still another theory, and that is, that the promise by the grantee is in the nature of an indemnity to the mortgagor, and under either of these theories the mortgagor may surrender or release the indemnity, or release the grantee from his promise before it is accepted, or before the mortgagor is released from the debt by the mortgagee. This Court has never recognized either of these theories as the law. It has ever been held by this Court that such a promise inures to the benefit of the person for whose benefit it is made, and the right to sue is vested in him by force of the agreement itself. It has never been held by this Court that the express assent of the beneficiary is essential to his right to avail of its benefits; nor has it been held, to have force as an agreement to the person in whose favor it was made he must discharge his debtor, and accept the maker of the new promise as his debtor. On the contrary, it was held in *Dean v. Walker*, *supra*, that the mortgagee might sue either the mortgagor or his grantee assuming to pay the debt. Nor has it been held that the promise of the grantee to the mortgagor is a mere indemnity of the latter against the payment of the mortgage. On the contrary, this Court has uniformly held that the beneficiary may sue at law, which repudiates the doctrine of indemnity, as the person for whose benefit the promise is made can never reach an indemnity or security given to his debtor but in chancery, and then only when his debtor is insolvent, or on some other equitable grounds. The principle upon which this

¹ Only so much of the opinion is given as relates to this question.—ED.

Court has acted is that such a promise invests the person for whose use it is made with an immediate interest and right, as though the promise had been made to him. This being true, the person who procures the promise has no legal right to release or discharge the person who made the promise, from his liability to the beneficiary. Having the right, it is under the sole control of the person for whose benefit it is made—as much so as if made directly to him.

It is urged there was not a sufficient consideration to support the promise of appellant to pay the debt owing to Mrs. Williams. That is a misconception. He received the equity of redemption of the land, which he supposed was worth all that he promised to pay, and that was sufficient to support the promise. Nor does it matter whether it was received from his grantors or Mrs. Williams. Whether from the one or the other it was equally binding. There is no force in this objection.

Perceiving no error in the record, the decree of the Appellate Court is affirmed.

Decree affirmed.

SCHOLFIELD, J., dissenting :

I cannot concur in this opinion. The precise question has never been presented to this Court before. The release of Sissons was executed before any acceptance by Mrs. Williams of the assumption by Bay of the payment of the debt of Newman & Sissons. She might have accepted their assumption, but it was optional to do so or not. She was under no obligation to do so. Notwithstanding the sale of the land to Bay, she had, apart from his assumption, all the security she had ever had for the payment of her debt—namely, the individual note of Newman & Sissons, secured by trust deed on the land, in the purchase of which the indebtedness was incurred. Bay owed Mrs. Williams no duty in regard to this liability, further than he might voluntarily assume to protect his purchase, and Newman & Sissons were under no obligation to furnish her any additional security. It was purely voluntary, therefore, upon the part of Newman & Sissons, and Bay, whether Bay, in purchasing the land, should assume the payment of the debt of Newman & Sissons to Mrs. Williams, and purely voluntary upon her part whether she should accept it or not ; and so it is impossible that she could have had a vested interest in the assumption before she had done some act upon the faith of it, making herself thereby irrevocably a party to it. Having no vested interest in the assumption, it must necessarily follow that the release put an end to it, so that she could not afterward elect to accept it. The assumption clause having been executed voluntarily, and without any

legal claim on her part to have it executed, it was in the nature of a mere offer, until acted upon, which might be withdrawn at pleasure, and the execution of the release was, in effect, its withdrawal. The authorities, so far as I have examined, all accord in this view. *Durham v. Bischof et al.*, 47 Ind. 211; *Davis v. Calloway*, 30 Ind. 112; *Carnahan v. Toucey*, 93 Ind. 564; *Moore v. Ryder*, 65 N. Y. 442; *Stephens v. Cassbacker*, 8 Hun, 116; *Crowell v. Currier*, 27 N. J. Eq. 152; *Butterfield v. Hadstrom*, 7 N. H. 345.

DICKEY, J. I concur in the views here expressed by the Chief Justice. If A., owing B. a given sum, for a valuable consideration takes a written promise made by C. to A. (and to which promise B. is not a party), that C. will pay to B. the amount due to B. by A., this is simply a contract between A. and C., in which B., strictly speaking, has no rights. By the ancient rules B. could not avail himself of this promise, except by a suit in the name of A. against C. Afterward the form of proceeding was so modified that B. was, and now is, permitted to sue in his own name instead of in the name of A. for his use. When A. thus exacts a promise from C. to pay A.'s debt to C., it affects B. only in so far as the same may be regarded as an offer by A. to B. to give B. additional security. Until something occurs which may be construed as an executed gift A. may withdraw the offer.

SHELDON, J., concurs in the opinion of the Chief Justice.

VAN BUREN WHEAT ET AL., RESPONDENTS, v. HARVEY
RICE ET AL., APPELLANTS.

IN THE COURT OF APPEALS OF NEW YORK, NOVEMBER 25, 1884.

[*Reported in 97 New York Reports 296.*]

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made April 8th, 1882, which dismissed an appeal taken by defendants Rice and others from judgment in favor of plaintiffs, entered upon the report of a referee.

This action was brought to reform a contract between plaintiffs and defendant Stotenburgh by striking out certain clauses which, plaintiffs alleged, had been inserted therein by mistake of the scrivener, and without the knowledge or assent of the parties.

The defendants other than Stotenburgh are creditors of the firm of Stotenburgh, Root & Co., and they alone appeared and answered.

The material facts are stated in the opinion.

Marsenus H. Briggs for appellants.

John Callister for respondents.

FINCH, J. The plaintiffs and the defendant Stotenburgh signed an agreement in writing containing two clauses which were afterward claimed to have been inserted by mistake.

At the date of its execution the firm of Stotenburgh, Root & Co. was indebted to several creditors, and, continuing its business thereafter, contracted other and additional debts to the same and other persons. Both classes of creditors are among the defendants in this action. The written agreement stipulated that Stotenburgh sold to Wheat & Salisbury, the present plaintiffs, "the equal undivided one quarter of the plaster mill and quarries, and one quarter of all the personal property of the firm of Stotenburgh, Root & Co.," in consideration whereof Wheat & Salisbury agreed to pay to Stotenburgh \$3000, and "to assume and pay one quarter of the present incumbrance on the property," "and one quarter of all the indebtedness of the firm of Stotenburgh, Root & Co., of which the said Isaac Stotenburgh is a member, as the same may become due and payable." The written instrument contained also a further stipulation, "that by reason of said purchase the said Van Buren Wheat and Joseph F. Salisbury become members of said firm of Stotenburgh, Root & Co., to the amount of one quarter interest in all the real and personal property belonging to the said firm of Stotenburgh, Root & Co., and liable to pay the indebtedness of the said firm in the same manner and to the same extent as if they had been members of the original firm of Stotenburgh, Root & Co." When some considerable time after its date the plaintiffs discovered that the instrument which they had signed contained the two clauses in question, they commenced an action in equity to reform the writing by striking out the promise to pay one quarter of the firm indebtedness, and the agreement to become a partner. Stotenburgh was made a defendant, and also the creditors of the firm. The allegations of the complaint relating to and affecting the latter were that they "have given out and claim that these plaintiffs are liable as members of said firm to pay each and every of said promissory notes, and they severally threaten to sue the said firm, and these plaintiffs as members of said firm upon their respective promissory notes, and the said Mary A. B. Swan has sued the said firm and these plaintiffs upon her said promissory

note of \$142.50, which suit is still pending and undetermined." The complaint gave the date of the last-named note, which was April 1st, 1875, while the written agreement was dated the November previous. The relief specifically asked against these creditors was that they be restrained until the determination of the action from prosecuting the plaintiffs "on their said promissory notes." It is to be observed, therefore, that the complaint makes no reference to any right of action of the creditors except that against the firm and the plaintiffs as members of the firm, and there is neither averment, admission, nor the least intimation that the creditors who were such at the date of the writing had accepted or adopted, by word or act, the promise contained in it to pay the existing indebtedness of the firm; nor is any relief asked restraining them from suing on such promise. The creditors answered. They on their part make no allusion to that promise; they do not allege that they accepted or adopted it, or claim any right founded upon it; but, on the contrary, put their rights explicitly upon the ground of plaintiffs' liability as members of the firm, and the only allegation even remotely or incidentally referring to the debts of the firm which antedated the written agreement was that after that date each had "extended to the said firm of Stotenburgh, Root & Co. credit, and loaned moneys, or continued the loan of moneys previously loaned to said firm," relying on knowledge of the agreement "and the partnership of said plaintiffs." The pleadings, therefore, did not assert any acceptance or adoption by the creditors at any time of the special promise to pay the debts existing at the date of the agreement, but, on the contrary, raised only the question whether the plaintiffs had actually become partners, or had made themselves liable by acting or holding themselves out as such. Upon the trial the plaintiffs gave evidence confined to the question of reformation, and when they rested, the defendants moved for a nonsuit upon the express ground, among others, that "the complaint does not allege, and plaintiffs have failed to show that the claims of the defendants set forth in the complaint are based on the contract sought to be reformed, or that the defendants threaten to set up in their actions at law the contract sought to be reformed."

Nowhere in the defendants' evidence was there proof of any act or word of the creditors accepting or adopting the promise to pay debts; but, on the contrary, at the close of the case the motion for a nonsuit was repeated upon all the grounds first stated, including that which denied, on behalf of the creditors, any assertion in the pleadings or proof that an action had been threatened upon the contract.

Laying aside, then, for later consideration, that part of the writing which purported to make plaintiffs partners in the firm of Stotenburgh, Root & Co., and confining our attention to the promise of plaintiffs to pay one quarter of the debts of the firm, standing alone and by itself, there are disclosed two reasons why that promise gave the creditors no rights whatever, and why they had no legal interest in the action to reform the contract.

The first is that no promise was made to pay any single one of such creditors, or for the benefit of any one of them. The promise was made to Stotenburgh, and for his benefit and that of the firm alone. The plaintiffs agreed to pay one quarter of the firm's indebtedness. If the next day they had ascertained its entire amount and paid over to Stotenburgh, Root & Co. one quarter of that total their contract would have been fulfilled. They would have put back into the firm assets precisely what they had agreed to give for what was taken out. Or if, again, there were ten creditors, all of whose debts were due, and one of them held one quarter of the total, the plaintiffs might pay him and owe nothing to the other nine, or pay a part of the nine and owe nothing to the rest. In other words, no one, nor any specific and identical creditor, could so show, in advance of payment, that the promise was intended for his benefit, or covered any part of his debt as to establish that he could maintain an action on such promise. Whether it would benefit him or not depended wholly upon the undisclosed option of the plaintiffs down to the moment at which they were required to pay "one quarter of the indebtedness" of the firm. It would be a very great extension of the doctrine of *Lawrence v. Fox*, 20 N. Y. 268, to give a right of action to a creditor for whose benefit the promise might or might not have been made. In *Barlow v. Myers*, 64 N. Y. 41, where the promise was to pay generally "the debts of Randall & Williams, without specification of the particular debts, or naming the creditors of the firm," attention was called to the fact that in this respect the case differed from all the cases in which the right of action had been sustained in behalf of the third party. But while there it was possible to say that the creditors were sufficiently identified as belonging to a class all of whom were to be paid, here, on the other hand, no class is named or described, and who was to be paid by the promisor, or to what extent is left absolutely uncertain and undetermined. We prefer to restrict the doctrine of *Lawrence v. Fox* within the precise limits of its original application.

But there is another reason for saying that the defendant

creditors had no legal interest in the promise of plaintiffs which could entitle them to contest the action for a reformation of the contract. We held in *Dunning v. Leavitt*, 85 N. Y. 35,¹ and again in *Crowe v. Lewin*, 95 N. Y. 423, that the right of the third party benefited by the promise, at least before he had accepted and adopted it, was of such derivative and imperfect character, if, indeed, it attached at all, and was so subject to the relations and equities of the original promisor and promisee, that the destruction of the consideration of the promise in the one case and the rescission or annulment of the contract in the other, in actions to which the alleged beneficiary was not a party and in which he had not been heard, barred and prevented him from any right of action upon the promise. If we have construed the pleadings and read the evidence correctly, that is the case here. There had been no acceptance or adoption by

¹ It is said that the action can be sustained upon the doctrine of *Lawrence v. Fox*, 20 N. Y. 268, and kindred cases. But I know of no authority to support the proposition that a person not a party to the promise, but for whose benefit the promise is made, can maintain an action to enforce the promise where the promise is void as between the promisor and promisee, for fraud, or want of consideration, or failure of consideration. It would be strange, I think, if such an adjudication should be found. The party suing upon the promise, in cases like *Lawrence v. Fox*, is in truth asserting a derivative right. In *Vrooman v. Turner*, 69 N. Y. 280, it was held that an assumption clause in a deed did not give a right of action to the mortgagee, where the grantor was not himself liable to pay the mortgage debt, although in that case there was ample consideration for the promise of the defendant.

There is no justice in holding that an action on such a promise is not subject to the equities between the original parties springing out of the transaction or contract between them. It may be true that the promise cannot be released or discharged by the promisee, after the rights of the party for whose benefit it is said to have been made have attached. But it would be contrary to justice or good sense to hold that one who comes in by what Allen, J., in *Vrooman v. Turner*, calls "the privity of substitution," should acquire a better right against the promisor than the promisee himself had. This case is an illustration. The plaintiffs, when they took their mortgage, did not rely upon the covenant they now seek to enforce. The covenant was not made until several years afterward. There was no consideration for it passing between the plaintiffs and Mrs. Leavitt. They now seek to avail themselves of it, and insist that although the consideration has failed, this defence is not available to the defendant, and that Mrs. Leavitt, although she has paid \$10,000 in cash for property to which her grantor had no title, must pay \$15,000 more, if need be, and be remitted for her remedy to the covenants in her deed, which may, from the insolvency of her grantor or other reasons, be wholly worthless. The plaintiffs have nothing to sell on their mortgage, and if they can hold Mrs. Leavitt for the deficiency, they will be able to shift the burden of a practically unsecured claim upon a party with whom they have had no dealing whatever.—Andrews, J., *Dunning et al. v. Leavitt*, 85 N. Y. 30, 35-36.—ED.

word or act. Something of that kind was essential. *Turk v. Ridge*, 41 N. Y. 206 ; *Garnsey v. Rogers*, 47 N. Y. 242 ; *Vrooman v. Turner*, 69 N. Y. 285 ; *Knickerbocker Life Ins. Co. v. Nelson*, 78 N. Y. 151 ; *Brewer v. Dyer*, 7 Cush. 337. What it should be, whether a bare assent communicated to the promisor, or some decisive act of the third party by which his original position and rights have been changed in reliance upon the promise, before the equities between the contractors become burdened with a right to interfere and be heard belonging to the third party, we do not now decide because it is wholly unnecessary. It is enough that these creditors neither by word nor act in any manner assented to or adopted the promise before the action for its reformation. They were, therefore, not necessary parties to that action, had no legal interest in it, and were properly denied the right of appeal.

It only remains to consider whether the other clause of the writing which purported to make the plaintiffs partners in the firm of Stotenburgh, Root & Co. gave the creditors a right to resist the reformation of the writing. They had no legal interest in the question. The judgment rendered does not at all bar their right to sue the plaintiffs as members of the firm of Stotenburgh, Root & Co., to establish that they were partners, or had so held themselves out as such as to have become liable. Relatively to that ground of action the writing was but evidence, and the creditors had no vested right to prevent the parties to it from making it speak the truth. The opinion of the General Term states this proposition so clearly that the appellants here practically concede it, but insist that "instead" of resting upon the ground of partnership, "the appellants seek to recover upon the contract itself for indebtedness included within its terms." We have already considered that ground of interference by the creditors and decided against it. It follows that the General Term committed no error in dismissing the appeal.

The judgment should be affirmed with costs.

All concur except RAPALLO, J., absent.

Judgment affirmed.

SAMUEL ADAMS v. DAVID KUEHN.

IN THE SUPREME COURT OF PENNSYLVANIA, JANUARY TERM,
1887.

[*Reported in 119 Pennsylvania State Reports 76.*]

BEFORE Gordon, C.J., Paxson, Sterrett, Green, and Williams, JJ.; Trunkey and Clark, JJ., absent.

No. 228 January Term, 1887, Supreme Court ; Court below, No. 40 January Term, 1886, Common Pleas.¹

Edward Harvey for the plaintiff in error.

C. J. Erdman (Henninger and Dewalt) for the defendant in error.

WILLIAMS, J. In 1884 and for several years prior thereto, the firm of Weaver Brothers was extensively engaged in the manufacture of cigars. Samuel Adams was an accommodation endorser for them, and in August, 1884, was upon their paper for upward of \$40,000. He became satisfied that the firm was insolvent, and asked them to secure him by giving him a judgment note in a sum sufficient to cover his endorsements, so that he could have judgment entered against them and their stock seized and sold by the sheriff. On August 12th, 1884, they executed and delivered to him a judgment note for \$25,500, on which he caused judgment to be entered and execution to issue. The Weaver Brothers claim that this judgment note was executed by them upon the promise by Adams that he would do the following things—viz., that he would pay all their debts without regard to their number or amount ; that he would pay to them the sum of \$4000 in cash ; give them a house and lot adjoining, and some vacant lots in rear of, the property then occupied by them ; provide them a half interest in a grocery store and give them a “free name.” David Kuehn was a creditor of the Weaver Brothers at the time of their failure, and brings this suit against Adams to recover the debt due him from Weaver Brothers. He seeks to recover on the contract which the Weavers claim to have made with Adams when the judgment note was given him. Upon the trial two questions were raised ; one of fact as to the making of the contract on which the plaintiff sued, and one of law as to his right to sue upon it if made as alleged. The jury under an instruction from the Court that the action was well brought if they found the contract to have been made, have decided that this remarkable

¹ The statement of facts has been omitted.—ED.

contract was made as testified to by the Weavers. The question now to be considered is the correctness of the instruction.

The contract sued on is one to which the plaintiff is a stranger. It was made with the Weaver Brothers. The consideration moved wholly from them and they were the parties to be benefited by the performance of its terms. The common law rule is that "no one can sue on a contract to which he is not a party." Whart., Contracts, 784; Hare on Contracts, 193. The same rule is laid down in Chitty's Pleading. It is still adhered to in England. In this country it is recognized as the law in most of the States and by the Supreme Court of the United States. 98 U. S. Rep. 123. In this State it was stated very clearly by Sergeant, J., in *Blymire v. Boistle*, 6 W. 182. That case has been followed and the authority of the rule recognized in several later cases, among which are *Torrens v. Campbell*, 74 Pa. 472, and *Kountz v. Holthouse*, 85 Pa. 235. In the latter of these cases it was applied by Mercur, J., who said: "As he (the plaintiff) was a stranger to the contract and to the consideration on which it rested, he could not recover." In *Guthrie v. Kerr*, 85 Pa. 303, where it was apparent that an action could have been maintained by the personal representatives of Alexander Guthrie, it was said that "it would be a harsh rule of law that would throw on the defendant the additional burden of a suit by each of the legatees."

There is, however, a line of cases in which a third party has been allowed to recover on a contract to which he was not a party, and several of these are brought to our attention by the defendant in error. An examination of these cases will show that they recognize the rule as we have stated it, and are relieved from its operation because of the nature of the consideration of the contract sued on. The distinction on which they rest is pointed out in *Blymire v. Boistle*, *supra*. Where one person enters into a contract with another to pay money to a third, or to deliver some valuable thing, and such third party is the only party interested in the payment or the delivery, he can release the promisor from performance or compel performance by suit. If, on the other hand, a debt already exists from one person to another, a promise by a third person to pay such debt is for the benefit of the original debtor to whom it is made, and can only be released or enforced by him. If it could also be enforced by the original creditor the promisor would be liable to two actions for the same debt at the same time and upon the same contract. Among the exceptions are cases where the promise to pay the debt of a third person rests upon the fact that money or property is placed in the hands of the

promisor for that particular purpose. Also where one buys out the stock of a tradesman and undertakes to take the place, fill the contracts, and pay the debts of his vendor. These cases as well as the case of one who receives money or property on the promise to pay or deliver to a third person, are cases in which the third person, although not a party to the contract, may be fairly said to be a party to the consideration on which it rests. In good conscience the title to the money or thing which is the consideration of the promise passes to the beneficiary, and the promisor is turned in effect into a trustee. But when the promise is made to, and in relief of one to whom the promise is made, upon a consideration moving from him, no particular fund or means of payment being placed in the hands of the promisor out of which the payment is to be made, there is no trust arising in the promisor and no title passing to the third person. The beneficiary is not the original creditor who is a stranger to the contract and the consideration, but the original debtor who is a party to both, and the right of action is in him alone.

The application of this rule to the case under consideration is decisive of the plaintiff's case. If Adams made the agreement sued on, he made it with Weaver Brothers. Its various provisions were for their benefit. No fund was provided for the payment of the plaintiff's debt, no property was set apart for his benefit. The note, under all the evidence, was given for the purpose of covering the endorsements of Adams. This case, therefore, stands under the general rule and is not brought within the limit of the exceptions to its operation. The suggestion of the Court below that the title might be amended by adding the name of the Weaver Brothers as legal plaintiffs, will not relieve against the difficulty. If the plaintiff can maintain his suit so can every creditor of the Weaver Brothers maintain his separate action for his particular debt upon the same contract, and we would then have the Weaver Brothers as legal plaintiffs in possibly one hundred or more suits for the use of so many separate creditors on the same contract ; and, to close the series, an action by the Weavers to recover for the non-performance of such portions of the contract as related to payment of money or delivery of property directly to themselves. The inconvenience and injustice of such a result is too obvious to require discussion.

Judgment reversed.

HENRY B. WOOD & ANTHONY G. WOOD, COPARTNERS, v.
THOMAS MORIARTY.

IN THE SUPREME COURT OF RHODE ISLAND, MARCH 19, 1887.

[*Reported in 15 Rhode Island Reports 518.*]

PLAINTIFF'S petition for a new trial.

DURFEE, C.J. This is *assumpsit* for the price of lumber furnished to one Joshua W. Tibbetts for use in the erection of two houses for the defendant, Tibbetts having entered into a written contract with the defendant to build the houses before the lumber was furnished. Tibbetts, after going on for a while in the execution of the contract, released or assigned it to the defendant by an instrument under seal. The instrument begins by reciting the existence of the contract, and proceeds as follows, to wit :—

“ Now know ye that, for good and sufficient reasons, and in consideration of the sum of twenty-five dollars paid to me this day by said Moriarty, I hereby transfer and assign said contract back to said Thomas Moriarty, he agreeing to relieve me from further obligation under it, and I hereby releasing him from all claims or demands of whatever kind I may have or have had up to this day, August 26th, 1885, against said Moriarty, I hereby acknowledging full payment for said claims and demands, and this shall be his receipt in full for the same to date, meaning hereby to convey to the said Moriarty all my right, title, and interest into and under said contract, desiring to relieve myself from completing the work under the contract, and hereby agree to withdraw from said work on said houses, and leave them to his sole charge and care.”

At the trial, testimony was introduced or offered to prove the purchase of the lumber ; the execution of the release or assignment ; that the defendant, besides paying the consideration recited therein, agreed, by way of further consideration, to pay all bills incurred by Tibbetts on account of the contract released ; that among these bills was the bill of the plaintiffs for lumber ; and that notice of the arrangement between Tibbetts and the defendant was given by Tibbetts to the plaintiffs. The testimony as to the agreement to pay the bills incurred by Tibbetts was allowed to go in *de bene esse*, and at the close of the testimony for the plaintiffs the Court directed a nonsuit. The plaintiffs petition for a new trial.

The questions are, whether the plaintiffs were entitled to

prove by oral testimony that the defendant agreed to pay the bills incurred by Tibbetts under his contract, by way of further consideration for the release or assignment,¹ and if so, whether, upon proof thereof, the plaintiffs could maintain their action.

The defendant contends that the agreement was within the Statute of Frauds, being an agreement not in writing to answer for the debt of another. But an agreement to answer for the debt of another, to come within the Statute of Frauds, must be an agreement with the creditor. A promise by A. to B. to pay a debt due from B. to C. is not within the Statute of Frauds. *Eastwood v. Kenyon*, 11 A. & E. 438; *Browne on the Statute of Frauds*, § 188. The contract here, as made between Tibbetts and the defendant, was certainly not within the statute. The question, therefore, takes this form—namely, whether the plaintiffs are entitled to take advantage of the contract and bring suit upon or under it, and if so, whether to such suit the statute is not a good defence. Some of the cases cited for the plaintiffs cover both these points completely. *Barker v. Bucklin*, 2 Denio, 45; *Johnson v. Knapp*, 36 Iowa, 616; *Barker v. Bradley*, 42 N. Y. 316, 1 Amer. Rep. 521; *Beasley v. Webster*, 64 Ill. 458; *Jordan v. White*, 20 Minn. 91; *Joslin v. New Jersey Car Spring Co.* 36 N. J. Law, 141; *Townsend v. Long*, 77 Pa. St. 143, 146. Similar citations might be multiplied if we cared to load our opinion with them. See *Browne on the Statute of Frauds*, §§ 166 *a*–166 *b*, and notes. On the other hand, the cases are numerous which hold that such an action is not maintainable for want of privity between the parties. Mr. Browne, in § 166 *a*, says that this is the settled doctrine in England, Michigan, and Connecticut; that in North Carolina and Tennessee the question seems to remain open; and that in Massachusetts the English doctrine seems to be growing in favor, contrary to the earlier cases; but that in the other States the creditor's right to sue has been generally recognized. The course of decision in this State favors the creditor's right to sue, and in principle, we think, recognizes it, though it has not hitherto extended to a purely oral contract. *Urquhart v. Brayton*, 12 R. I. 169; *Merriman v. Social Manufacturing Co.* 12 R. I. 175. Courts that allow the action generally hold that it is not affected by the Statute of Frauds, though, as Mr. Browne remarks, they do not unite in the reasons which they give for so holding. Mr. Browne himself suggests that the contract, as between the creditor and promisor, arises by implication out of the duty of the promisor under his contract with the debtor, and that, being implied, it is not with-

¹ So much of the opinion as relates to this question has been omitted.—Ed.

in the Statute of Frauds. Browne on the Statute of Frauds, § 166 *b.* The view accords with the doctrine of *Brewer v. Dyer*, 7 Cush. 337, where the Court remark, p. 340, "that the law, operating on the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation on which the action is founded."

The diversity of decision shows that the action cannot be maintained without resorting to implications or assumptions which the courts do not always find it easy to allow, and which they sometimes refuse to allow. It seems to us that we shall best find the grounds, if there are any, on which the action can be maintained, by an analysis or explication of the contract with the debtor. The contract is this: A. agrees with B., for a consideration moving from B., to pay to C. the debt which B. owes to C. The contract is absolute. If A. does not pay the debt, and B. has to pay, it is broken. It is, therefore, a contract by A. to pay the debt in lieu of B., or in relief of B.; to take it on himself, and become, so far as he can independently of C., the debtor of C. in place of B. The contract, as between A. and B., is not collateral, but substitutional. But, this being so, how does C., who is not a party to it, get the right to sue A. upon or by reason of it? It has been held that he gets this right directly from the contract itself, because B., in making it with A., makes it for C., if C. desires to accede to it, as well as for himself, so that C. has only to ratify or assent to it, which he does unequivocally by suing on it. But, in this view, if C. accepts the contract, he must accept it as made; that is, as a contract by which A. agrees that he, instead of B., will pay the debt which B. owes to C. C. cannot, at the same time, assent to the contract and dissent from the terms of it. Accordingly, if he sues A. on the contract, he must sue him instead of B., and cannot also sue B., and B. is therefore released. But, as we have seen, another view has been taken. It has been held that the contract between A. and B. imposes a duty upon A. to pay to C. the debt which B. owes to him, and that from this duty the law implies a promise by A. in favor of C. to pay B.'s debt to C. But if a promise is implied from the duty, the promise must correspond to the duty. The duty which the contract imposes upon A. is that he, instead of B., shall pay the debt which B. owes to C., and accordingly so must be the promise to be implied from it. If, therefore, C. sues A. upon the implied promise, he must sue him as liable, instead of B., for the debt of B. to him, C.; he cannot consistently sue both A. and B., and consequently B. is released.

We do not claim that either of these views is free from diffi-

culty. Either of them, however, is free from one difficulty which other views encounter, and which is a principal reason why the courts which refuse to allow the action refuse to do so. Other views give the creditor the benefit of the new contract for nothing, since they allow him still to retain his hold upon the original debtor ; whereas, according to either of the views above set forth, the creditor cannot have the benefit of the new contract without assenting to the terms of it, thereby releasing the original debtor, so that the assent is in itself a consideration. As cases which support these views we will refer to Warren v. Batchelder, 16 N. H. 580 ; Bohannon v. Pope, 42 Me. 93. See also, Clough v. Giles, 2 New Eng. Reporter, 870. Of course, if either view be correct, the liability under the contract is not collateral, but direct and substitutional, and therefore not within the Statute of Frauds.

We do not think this case is distinguishable in principle from Urquhart v. Brayton, 12 R. I. 169. The doctrine of the latter case is not only just and convenient, but also consonant with the purposes of the parties, and we are not prepared to recede from it. As is remarked by the court in Lehow v. Simonton *et al.*, 3 Colorado, 346, "it accords the remedy to the party who in most instances is chiefly interested to enforce the promise, and avoids multiplicity of actions."

We think the declaration is proper in point of form, and we do not think the nonsuit is justifiable on the ground of variance.

In Warren v. Batchelder, 16 N. H. 580, the Court held that a demand on the defendant was requisite before suit. Whether this is so we need not decide, for the evidence in this case shows a demand before suit.

STINESS, J., non-concurring.

Petition granted.

Daniel R. Ballou & Frank H. Jackson for plaintiff.

James Tillinghast for defendant.

JULIA M. MARSTON v. GEORGE B. BIGELOW.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER 7, 1889.

[*Reported in 150 Massachusetts Reports 45.*]

CONTRACT, by the administratrix of the estate of Smith Curtis, for a balance due upon the following promissory note :

"BOSTON, April 1, 1876.

"For value received, I promise to pay to Smith Curtis, or order, the sum of ten thousand dollars, five years from

date, at the rate of six ($6\frac{1}{2}$) one half per cent per annum, payable semi-annually. Six months' notice in writing to be given to promisor or his representative if payment at the end of said term will be required, or before enforcing payment if said note is allowed to run over the term above limited, this note being given in full satisfaction and payment of all demands.

GEORGE B. BIGELOW."

On the back of the note, among other endorsements of payments of interest signed by the intestate, were the following :

"January 29th, 1879, received on account of the within nine hundred seventeen $\frac{8}{100}$ dollars, interest in full to date, also seventeen hundred and seventy dollars of principal."

"January 22d, 1880, received on account of interest on the within, twenty dollars."

The answer was as follows : "And now comes said defendant and says that he made a writing to the same effect as that declared upon, but he denies that there ever has been any demand for payment as therein required ; and he further says, that after making the said writing, to wit, the twenty-ninth day of January, in the year 1879, the father of this defendant paid to Smith Curtis, the plaintiff's intestate, the sum of twenty-six hundred and eighty-seven dollars and six cents, being all the interest accrued on the sum of ten thousand dollars, the amount specified in said writing to that date, and also the sum of seventeen hundred and seventy dollars on account of said principal sum, upon the consideration and distinct agreement of said Curtis that he would not thereafter sue or molest this defendant in any way by reason of the writing declared, or attempt to enforce said claim, but this defendant might make any further payments at any time thereafter that he might wish ; and he prays judgment if the plaintiff ought to have or maintain this action against him."

Writ dated July 17th, 1886.

Trial in the Superior Court, before Hammond, J., who, after a verdict for the plaintiff, reported the case for the determination of this Court, as follows :

The plaintiff contended that, in March, 1883, a notice was given by Curtis to the defendant, which notice was as follows : "Mr. George B. Bigelow : In your note dated April 1st, 1878, for ten thousand dollars, given to Smith Curtis, I give you notice I require payment of said note according to terms. Yours truly, 'Smith Curtis.'" She offered evidence that one Dexter, on March 10th, 1883, wrote the above notice at the request of Curtis, who then signed it ; that Dexter put it into

an envelope addressed to the defendant at the Old State House in Boston, and placed the same, postage paid, in the United States mail ; and that on the envelope was a request that the letter, if not delivered in five days, should be returned to Dexter, and that it was not returned. The plaintiff introduced other evidence tending to show that at a trial of another action the defendant testified that he had no recollection of having received the notice, but that it was possible he might have done so. There was evidence that the defendant, a year and a half before March 10th, 1883, removed from the Old State House to another building on Washington Street in Boston, where he remained until after March 10th, 1883 ; but there was no evidence that the defendant's new address was known to the postal authorities, unless that fact can be presumed from the usual course of postal service in the city of Boston. The defendant testified that he had no recollection that he made any request that his letters should be forwarded to his new address, or that they were so forwarded ; that he had no reason to believe that his letters were regularly or usually forwarded from the old to the new address, but that at that time he was, and for years had been, a lawyer in active practice, and daily received letters at his office by mail ; and that he saw Curtis a number of times after March 10th, 1883, and before his death, and no mention was made of the demand.

The defendant offered to prove, by competent evidence, that on January 29th, 1879, his father, Samuel Bigelow, conveyed a piece of real estate to Curtis for the sum of fifteen thousand dollars, receiving forty-five hundred dollars in cash and a portion of the balance in an endorsement upon the note in question ; that Curtis agreed with Samuel Bigelow, in consideration of this conveyance, never to molest or trouble the defendant for the balance due upon the note ; and that the interest to January 29th, 1879, and seventeen hundred and seventy dollars of the principal of the note, were then paid by this conveyance and endorsed upon the note. The plaintiff admitted that these sums should be allowed upon the note, but objected to the introduction of the evidence, on the ground that the agreement with Samuel Bigelow was not a bar to this action. The defendant contended that this defence was open to him under the Statute of 1883, ch. 223, if not before that statute, and asked the judge so to rule ; but as Samuel Bigelow was neither a party to the note nor to this action the judge ruled that notwithstanding the Statute of 1883 the defence was not open to the defendant, and excluded this evidence offered to support it ; and the defendant duly excepted. The defendant then moved that

Samuel Bigelow be summoned in as a party to this suit, so that the defence would become competent ; but the judge ruled, as matter of law, that Samuel Bigelow could not be summoned into Court for that purpose, and overruled the motion.

Upon the question whether the defendant received the notice of March, 1883, the defendant asked the judge to rule :

“ 1. That there was no evidence of the delivery of this notice of March 10th, 1883, to the defendant.

“ 2. That the presumption of the delivery of a letter sent postpaid through the mails to the person to whom it is addressed does not apply to a case where the letter is directed to a place from which the person to whom it is addressed has removed.”

The judge declined to give either of these instructions, and instructed the jury that there was a presumption that a letter sent postpaid through the mails is delivered at the place to which it is addressed ; and that if the person to whom it is addressed has removed from that place and has informed the postal authorities of the place to which he has removed, or if the authorities otherwise know the new address, it is a presumption, in the absence of other evidence, that the letter is delivered to him at the new address ; but that this was simply a presumption, and the jury were to consider upon the whole evidence whether the notice was received. The jury were further instructed to bring in a verdict for the plaintiff, if they found that the defendant received that notice ; otherwise, for the defendant.

The defendant contended that, as matter of law, the note did not bear interest from its date at the rate of six and a half per cent, and asked the judge so to rule, which he refused to do ; but upon the question of the amount of the verdict, if for the plaintiff, he instructed the jury, that, upon the question whether interest should be allowed from the date of the note, they might take into consideration the subsequent acts of the parties, and if they were satisfied from the subsequent dealings of the parties with reference to the note that the parties interpreted the note as one bearing interest from its date and acted upon that interpretation, the jury would be warranted in reckoning interest from its date. The defendant excepted.

The jury returned a verdict for the plaintiff for the balance due on the note, with interest from its date, upon which judgment was to be entered if the rulings and refusals to rule were correct.

The case was submitted on briefs to all the judges.

P. B. Kiernan for the plaintiff.

C. W. Turner & S. J. Elder for the defendant.

MORTON, C.J. The defendant offered to prove, as a defence to the note sued on, that on January 29th, 1879, which was before the note matured, his father, Samuel Bigelow, conveyed to the plaintiff's intestate a piece of land ; that a part of the consideration, namely, seventeen hundred and seventy dollars, was paid, and endorsed upon this note ; and that in consideration thereof the plaintiff's intestate agreed never to molest or trouble the defendant by suit for the balance due upon the note. This is not an offer to prove a satisfaction and discharge of the note. Indeed, such a defence is not open under the pleadings ; and the evidence shows that a year afterward the defendant made a payment on account of the balance due on the note, thus recognizing it as an existing obligation. It was merely an offer to prove a collateral promise never to sue the note, made to a stranger who is not a party to the note or to this suit. Such a promise, made upon good consideration to the defendant himself, would operate to defeat the suit. *Foster v. Purdy*, 5 Met. 442. The question is whether the defendant can avail himself of such a promise, made to a stranger, as a defence to the note. Unless he could bring a suit upon such contract, he cannot use it as a defence. Different rules upon this subject have been adopted and acted upon by different courts. But in this Commonwealth, as is stated in *Exchange Bank v. Rice*, 107 Mass. 37, "The general rule of law is, that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently that a promise made by one person to another, for the benefit of a third person who is a stranger to the consideration, will not support an action by the latter. And the recent decisions in this Commonwealth and in England have tended to uphold the rule and to narrow the exceptions to it." The subject is discussed and the authorities cited in *Metcalf on Contracts*, 205 *et seq.*

The defendant contends that, by a recognized exception to this rule, a son may sue upon a promise made for his benefit to his father. This was formerly held in several English cases, but it is not now so held in England. The only case in this court which supports the defendant's contention is *Felton v. Dickinson*, 10 Mass. 287. In that case the declaration contained counts in *indebitatus assumpsit* for two hundred dollars, in consideration of work and labor performed for the defendant by the plaintiff at the defendant's request, and a *quantum meruit* for the same work and labor. The evidence at the trial was, that the father of the plaintiff, when the latter was fourteen years of age, placed him in the service of the defendant, upon

an agreement that the plaintiff was to remain in that service until he should be of age, and that the defendant was to support him during that time, and to pay him two hundred dollars when he was of age. Upon the peculiar facts of the case, we think the court rightly decided that the son could maintain the action. The agreement of the father operated as an emancipation of the son, and entitled him to receive the wages of his labor. *Corey v. Corey*, 19 Pick. 29. The consideration of the wages he was to receive when he became of age was his labor ; and it may well be held, as matter of law, that the promise to the father to pay the son a stipulated sum was made to the father acting on behalf of and as the agent of the son, and thus a promise to him. The agreement was not an independent agreement, in which the son had no part or interest. From the nature of the contract he was a privy and party to it. He had an interest in it, and the father and the defendant could not, without his assent, rescind the agreement just before he became of age, and thus defeat his rights under it. The court, in its opinion, puts the decision upon the broad ground, that, "when a promise is made to one, for the benefit of another, he for whose benefit it is made may bring an action for the breach." But, as we have seen, this is not the law as established by the later decisions. *Exchange Bank v. Rice*, 107 Mass. 37, and cases cited.

While the case of *Felton v. Dickinson* was rightly decided upon its peculiar circumstances, we think it cannot be fairly regarded as establishing a general rule that a son may sue upon a promise made for his benefit to his father. The nearness of the relationship may be evidence that the promise to the father was made to him acting in behalf of, and as the agent of, the son, and therefore was a promise to the son ; but when it appears that the promise was not made to the son, and that the consideration did not move from him, we can see no reason why the nearness of the relationship should change the general rule of law, that a man cannot sue upon a contract to which he is not a party or privy.

In the case at bar there was no offer to prove a promise to the defendant not to sue ; the promise is set out in the pleadings and in the offer of proof as a promise to the father upon a consideration moving wholly from him. As to such agreement, there was no privity of contract between the plaintiff's intestate and the defendant. The only contract is between the plaintiff and Samuel Bigelow, and they may at any time revoke and annul it. The only party entitled to sue the plaintiff upon that contract, either at law or in equity, is Samuel Bigelow. The

case falls within the general rule of law, that one who is not a party to a contract cannot sue upon it. As the defendant could not enforce this agreement which he offered to prove, either in law or equity, he cannot avail himself of it as a defence in this suit, and the Superior Court rightly rejected the evidence offered by him to prove such contract.¹

Judgment on the verdict.

SILAS D. GIFFORD, AS RECEIVER, ETC., RESPONDENT, v.
MICHAEL AUGUSTINE CORRIGAN, AS EXECUTOR,
ETC., APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, NOVEMBER 26, 1889.

[*Reported in 117 New York Reports 257.*]

APPEAL by defendant Corrigan, as executor of Cardinal John McCloskey, deceased, from a judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 11th, 1889, which affirmed a judgment in favor of plaintiff, entered upon a decision of the Court on trial at Special Term.

This action was brought to foreclose a mortgage executed by defendant, the Father Mathew Temperance Society. Defendant Corrigan, as executor, was sought to be charged for any deficiency on sale upon a covenant in a deed of the mortgaged premises executed to his testator by John McEvoy, by the terms of which the grantee assumed and agreed to pay the mortgage. The facts, so far as material to the questions discussed, are stated in the opinion.

Edward C. Boardman for appellant.

Ralph E. Prime for respondents.

FINCH, J. But another circumstance introduces an additional defence and raises a further question.² Just after the issue of a summons in this action and the filing of a *lis pendens*, the executor of McEvoy formally released McCloskey from his covenant, and the latter pleads that release. It asserts that the deed was never delivered, which is found to be an untruth; that the assumption clause was inserted by mistake and inadvertence, of which there is not a particle of proof; and then in further consideration of §1 formally releases the Cardinal from

¹ Only so much of the opinion is given as relates to this question.—ED.

² Only so much of the opinion is given as relates to this question.—ED.

his covenant. This release was executed after the knowledge of the deed of McCloskey and the covenant contained in it had reached the mortgagee; after the latter had accepted and adopted it as made for his benefit and communicated that fact to the debtor by a formal demand of payment; after the mortgagee had, for three years, permitted the grantee to absorb and appropriate the rents and profits in reliance upon the covenant; and after he had commenced an action for foreclosure by the issue of a summons and filing of a *lis pendens*, at a moment when the executor who released was aware that trouble was approaching, but before McCloskey was actually served or had appeared in the action.

Is this release thus executed a defence to this action? I shall not undertake to decide, if, indeed, the question is open (*Knickerbocker Life Ins. Co. v. Nelson*, 78 N. Y. 137; *Comley v. Dazian*, 114 N. Y. 161, 167), whether in the interval between the making of the contract and the acceptance and adoption of it by the mortgagee it was or was not revocable without his assent. However that may be, the only inquiry now presented is, whether it is so revocable after it has come to the knowledge of the creditor, and he has assented to it and adopted it as a security for his own benefit. My judgment leads me to answer that question in the negative.

Of course it is difficult, if not impossible, to reason about it without recurring to *Lawrence v. Fox*, 20 N. Y. 268, and ascertaining the principle upon which its doctrine is founded. That is a difficult task, especially for one whose doubts are only dissipated by its authority, and becomes more difficult when the number and variety of its alleged foundations are considered. But whichever of them may ultimately prevail, I am convinced that they all involve, as a logical consequence, the irrevocable character of the contract after the creditor has accepted and adopted it, and in some manner acted upon it. The prevailing opinion in that case rested the creditor's right upon the broad proposition that the promise was made for his benefit, and, therefore, he might sue upon it, although privy neither to the contract or its consideration. That view of it necessarily involves an acquisition at some moment of time of the right of action which he is permitted to enforce. If it be possible to say that he does not acquire it at the moment when the promise for his benefit is made, it must be that he obtains it when it has come to his knowledge and he has assented to and acted upon it. For he may sue; that is decided and conceded. If he may sue, he must, at that moment, have a vested right of action. If it was not obtained earlier it must have vested in

him at the moment when his action was commenced, so that the right and the remedy were born at the same instant. But there is no especial magic in a lawsuit. If it serves for the first time to originate the right which it seeks to enforce, it can only be because the act of bringing it shows unequivocally that the promise of the grantee has come to the knowledge of the plaintiff, that the latter has accepted and adopted it, that he intends to enforce it for his own benefit, and gives notice of that intention to the adversary. From that moment he must be assumed to act or omit to act in reliance upon it. But if all these things occur before a suit commenced, why do they not equally vest the right of action in the assignee? What more does the mere lawsuit accomplish? And so the contract between grantor and grantee, if revocable earlier, ceases to be so when by his assent to it and adoption of it the creditor brings himself into privity with it and elects to avail himself of it, and must be assumed to have governed his conduct accordingly. I see no escape from that conclusion.

But two of the judges who concurred in the decision of *Lawrence v. Fox* stood upon a different proposition. They held that the mortgagor granting the land accepted the grantee's covenant, as agent of the mortgagee who might ratify the act with the same effect as if he had originally authorized it. While I think the idea of such an agency is a legal fiction, having no warrant in the facts, yet the same result as to the power of revocation follows. While the agency remained unauthorized it might be possible to change the transaction, but after the ratification the promise necessarily becomes one made to the mortgagee, through his agent, the mortgagor, acting lawfully in his behalf, and from that moment cannot be altered or released without his sanction and consent.

But another basis for the action has been asserted, applicable, however, only to cases like the present, where, on foreclosure of the mortgage, its owner seeks a judgment for a deficiency against the new covenantor. In *Burr v. Beers*, 24 N. Y. 179, and again in *Garnsey v. Rogers*, 47 N. Y. 242, it was pointed out that the liability of the grantee to the mortgagee rested upon the equitable right of subrogation, and had been recognized and enforced long before *Lawrence v. Fox* made its appearance. It was held that where the mortgagor acquired a new security for his indemnity against the debt which he owed to the mortgagee, the latter might, in equity, be subrogated to the right of his debtor, and, under the statute permitting any person liable for the mortgage debt to be made defendant and charged with a deficiency in the foreclosure, the new covenant

became available to the mortgagee. It was so held in *Halsey v. Reed*, 9 Paige, 446, and the right of the mortgagee was put upon the equity of the statute. That, if a sound proposition, was all very well so long as there was supposed to be no equivalent remedy at law, but after the decision of *Lawrence v. Fox* that remedy existed. And so in *Thorp v. Keokuk Coal Company*, 48 N. Y. 258, the Court said that it saw no reason for invoking the doctrine of equitable subrogation, or resting upon it in such a case. When the law has absorbed, in a broader equity, the narrow one enforced in chancery, the form and measure of the latter ceases to be of consequence. One does not seek to trace the river after it has lost itself in the lake. And so I think the suggestion is well founded. But if I am wrong about that, as, perhaps, I may prove to be, and the right of the present plaintiff against the Cardinal's estate does stand upon the doctrine of equitable subrogation, still I think the same result follows. When does that equitable right arise and become vested in the creditor? It would seem that it must be when the situation is created out of which the equity is born. If it be possible to adjourn it to a later period, it must certainly attach when the creditor asserts his right to it and notifies the other party of his intention to rely upon it. As a right, founded upon the equity of the statute, it must have come into being before the foreclosure suit was commenced, for the permission reads, "any person who is liable to the plaintiff for the payment of the debt secured by the mortgage may be made a defendant in the action." His liability must precede the commencement of the action. It must exist as a condition of his being sued at all; and so, assuming that this action can be maintained against him upon his promise, the right of action must have arisen at once upon the delivery of the deed, or at the latest when the promise came to the knowledge of the creditor, and he assented to and adopted it.

I have been quite favorably impressed with a fourth suggestion respecting the basis of these rights of action which appears in the opinion of Andrews, J., rendered when this case was before us on a previous appeal. "After all," he says, "does not the direct right of action rest upon the equity of the transaction?" If we discard the fictitious theory of an agency, what remains is the equitable right of subrogation swallowed up in the greater equity of the legal right founded on the theory of a promise made for the benefit of the creditor. It is no new thing for the law to borrow weapons from the arsenal of equity. The action for money had and received is a familiar illustration. May we not deem this another? If we do, and the door

is thus opened wide to equitable considerations, I am quite sure it will follow that while no right of the mortgagee is invaded by a change of the contract before it is brought to his knowledge, and he has assented to it and acted upon it, yet to permit a change thereafter, while the creditor is relying upon it would be grossly inequitable and practically destroy the right which has maintained itself after so long a struggle.

It seems to me, therefore, that however we may reasonably differ as to the doctrine underlying the plaintiff's right of action, yet all the roads lead to the one result that upon the facts of this case the release to McCloskey was wholly ineffectual.

The judgment should be affirmed with costs.

All concur except DANFORTH and PECKHAM, JJ., dissenting.
Judgment affirmed.

SAUNDERS *v.* SAUNDERS ET AL.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS,
SEPTEMBER 3, 1891.

[*Reported in 154 Massachusetts Reports 337.*]

CONTRACT for breach of an agreement under seal. The case was submitted to the Superior Court, upon an agreement that, if the plaintiff was not entitled to maintain her action, judgment was to be entered for the defendant. Pitman, J., ordered judgment for the defendant, and the plaintiff appealed to this Court. The facts appear in the opinion.

The case was submitted on briefs in January, 1891, and afterward, in September following, was submitted on the same briefs to all the judges.

W. D. Northend for the plaintiff.

C. Sewall for the defendant.

MORTON, J. This action is brought by the plaintiff upon an instrument under seal, to which she is not a party, and of which none of the consideration moved from her. The instrument is signed by Charles F. Saunders, the defendant, and is between him and George M. Saunders, who together, and the survivor of them, were entitled to the income of a trust fund. The consideration is \$1 paid by said George M. Saunders, and like covenants on the part of said George with said Charles to those contained in the instrument declared on. The covenants or agreements in the instrument relied on are as follows: "I, the said Charles F. Saunders, do hereby covenant and agree to and

with the said George M. Saunders, and to and with such person as may be the wife of said George M. Saunders at the time of his decease, that if the said George M. shall die in my lifetime, leaving a widow living, I will, from and after the decease of said George M., and during my lifetime, pay over to such person as may be the widow of said George M., one third of the entire income aforesaid to which I may be entitled as such survivor." The plaintiff is the widow of George, and it is clear that, so far as she relies upon the covenants and agreements made between her husband and the defendant for her benefit, they will not support this action. It is well settled in this State, in regard to simple contracts, that "a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently that a promise made by one person to another, for the benefit of a third person who is a stranger to the consideration, will not support an action by the latter." *Exchange Bank v. Rice*, 107 Mass. 37, and cases cited. *Rogers v. Union Stone Co.*, 130 Mass. 581; *New England Dredging Co. v. Rockport Granite Co.*, 149 Mass. 381; *Marston v. Bigelow*, 150 Mass. 45. In regard to contracts under seal, the law has always been that only those who were parties to them could sue upon them. *Sanders v. Filley*, 12 Pick. 554; *Johnson v. Foster*, 12 Met. 167; *Northampton v. Elwell*, 4 Gray, 81; *Flynn v. North American Ins. Co.*, 115 Mass. 449; *Flynn v. Massachusetts Benefit Association*, 152 Mass. 288. The case of *Felton v. Dickinson*, 10 Mass. 287, to which this case would seem to be somewhat analogous, is fully explained in *Marston v. Bigelow*, *ubi supra*, and is authority only to the extent there indicated.¹

¹ It is to be observed that the instrument executed by the city to the State is not a bond. The city is not bound in a penalty, from which it may be discharged on the performance of a condition. So that the case of *Turk v. Ridge*, 2 Hand, 206, is not applicable. The instrument is an agreement of the city, under its corporate seal, with the State, for the protection and indemnity of the State, and the payment of all damages caused to property, and by it the city doth in terms assume all liability therefor. In consideration that the State would do this work, and in view of the certain result, that damage must be done to property in the doing of it, the city makes to the State this promise, that it will pay that damage. Here is the promise, the consideration and the promisee, definitely brought out. The ultimate beneficiary is uncertain. It is settled in this State that an agreement made on a valid consideration, by one with another, to pay money to a third, can be enforced by the third in his own name. *Lawrence v. Fox*, 20 N. Y. 268; *Secor v. Lord*, 3 Keyes, 525. And though a distinction has sometimes been made in favor of a simple contract (*Hall v. Marston*, 17 Mass. 575; *D. & H. Canal Co. v. W. Co. Bank*, 4 Den. 97), it is now held that when the agreement is in writing, and under seal, the same rule prevails. *Van*

It is suggested, however, that, somewhat after the analogy furnished by letters of credit, the plaintiff may avail herself of so much of the covenants and agreements as purports to be made "to and with such person as may be the wife of said George M. Saunders at the time of his decease"—that is, that this covenant amounts to a promise on the part of the defendant to whomsoever may be the wife of George M. Saunders at his death, that he will pay her annually thereafter a certain sum so long as he shall live, and that the plaintiff, being the wife of said George, may therefore maintain an action upon it. But it is to be observed that the covenant did not purport to create a present agreement with the person who was the wife of George at the time the agreement between him and the defendant was executed; neither does it purport to be a continuing offer or promise on the part of the defendant, as in the case of a letter of credit or an offer of reward, that, if the person who shall be *Schaick v. Third Av. R. R.*, 38 N. Y. 346; *Ricard v. Sanderson*, 2 Hand, 179. Nor need the third person be privy to the consideration. *Secor v. Lord*, *supra*. Nor need he be named especially as the person to whom the money is to be paid. In that class of cases, which holds that a grantee of mortgaged premises, who takes them subject to the lien of the mortgage, which, by words in the deed of conveyance to him, he assumes to pay, is personally liable to the holder of the mortgage, for the amount of the mortgage debt, no question seems to be made; but that the action may be maintained in the holder's name, though the agreement be not made immediately for the benefit of the plaintiff, nor he be named in the deed. Thus in *Burr v. Beers*, 24 N. Y. 178, the clause in the deed described the mortgages as held by John Cramer, which mortgages the grantee thereby assumed to pay. And the case last cited was not an action in equity, for the foreclosure of the mortgage, in which the mortgagor and his grantee were both parties. (See page 179.) It was an action to recover a personal judgment against the grantee. The question was distinctly raised, that there was no privity of contract between the plaintiff and defendant. And the decision against the defendant was put in the language of Denio, J., "upon the broad principle that if one person make a promise to another for the benefit of a third person, that third person may maintain an action on the promise."—*Folger, J., Coster v. Mayor of Albany*, 43 N. Y. 399, 410-412.

It is claimed that the parties for whose benefit a contract is made may sue thereon in their own names, although the agreement may not be to or with them. That is the rule with reference to simple contracts, but not in respect to contracts under seal. The rule is, that a covenant cannot be sued upon by the person for whose benefit it is made, if he is not a party to the deed, but the suit must be brought in the name of the person with whom the covenant is made. *Moore v. House*, 64 Ill. 162; *Gautzert v. Hoge*, 73 Ill. 30. That rule was not abrogated by § 19 of the present Practice act. Said section provides: "Any deed, bond, note, covenant, or other instrument under seal, except penal bonds, may be sued and declared upon or set off as heretofore, or in any form of action in which such instrument might have been sued and declared upon or set off if it had not been under seal, and demands upon simple contracts may be set off against demands

the wife of George at the time of his decease shall do certain things, then the defendant will pay her a certain sum. On the contrary, it was an attempt to create a covenant to arise wholly in the future between the defendant and a party who at the time was unascertained, and from whom no consideration was to move, and who was not in any way privy to the contract between the defendant and said George. We do not think this can be done.

The question whether the administrator or executor of the husband of the plaintiff may not maintain an action on the agreement for her benefit, or whether she may not herself bring suit in the name of the executor or administrator, has not been argued to us, and we have not therefore considered it. For these reasons a majority of the Court think that, according to the agreement, the entry must be, judgment for the defendant.

upon sealed instruments, judgments or decrees." The only changes made in the law by this statute were to extend the right of set-off, and to allow recovery upon sealed instruments in forms of action other than those wherein such recovery might have been had prior to that statute. It did not purport to abolish all distinctions between sealed and unsealed instruments, or to give a right of action that did not theretofore exist, but merely provided additional forms of action for the enforcement of rights predicated upon such sealed instruments. In *Protection Life Ins. Co. v. Palmer*, 81 Ill. 88, this Court said: "This section has abolished the distinction between sealed and unsealed instruments as to the form of action." And in *Adam v. Arnold*, 86 Ill. 185, said: "Since the Act of 1872 the distinction between sealed and unsealed instruments, as to the form of action to be brought upon them, has been abolished." The language used in *Dean v. Walker*, 107 Ill. 540, to the effect that since the passage of the act it is immaterial for the purpose of bringing a suit by a third person upon a provision for his benefit in a contract made between other persons, whether such contract is under seal or not, is mere *obiter dictum*, as that question was not there involved.—*Baker, J., Harms et al., v. McCormick et al.*, 132 Ill. 104, 109-110.

It is also argued, as Mansfield's name does not appear in the letters of Hendrick, that he could not join in this action. This would be true if the promise were under seal, requiring an action of debt or covenant; but the right of a party to maintain *assumpsit* on a promise not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country.—*Davis, J., Hendrick v. Lindsay et al.*, 93 U. S. 143, 149.—ED.

BENEDICTA DURNHERR, APPELLANT, v. JOSEPH RAU,
RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, OCTOBER 4, 1892.

[Reported in 135 New York Reports 219.]

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made June 2d, 1891, which affirmed an order entered upon the minutes, setting aside a verdict in favor of plaintiff and granting a new trial.

This was an action to recover damages for an alleged breach of covenant in a deed from Emanuel Durnherr, plaintiff's husband, to defendant.

The facts, so far as material, are stated in the opinion.

Theodore Bacon for appellant.

William E. Edmonds for respondent.

ANDREWS, J. The deed from Emanuel Durnherr to the defendant recited that it was given in payment of a debt owing by the grantor to the grantee of \$660, "and the further considerations expressed herein." The grantee covenanted in the deed to pay all incumbrances on the premises "by mortgage or otherwise." This constitutes the only "further consideration" on his part expressed therein. The deed also declared that the wife of the grantor (the plaintiff) reserved her right of dower in the premises. The conveyance contained a covenant of general warranty by the grantor, and the only legal operation of the clause respecting the dower of the wife was to limit the scope of the warranty by excluding therefrom her dower right. By the foreclosure of the mortgages on the premises existing at the time of the conveyance, in which (as is assumed) the wife joined, the title has passed to purchasers on the foreclosure, and the inchoate right of dower in the wife has been extinguished. This action is brought by the wife on the defendant's covenant in the deed, and she seeks to recover as damages the value of her inchoate right of dower, which was cut off by the foreclosure.

The courts below denied relief, and we concur in their conclusion. The covenant was with the husband alone. He had an interest in obtaining indemnity against his personal liability for the mortgage debts, and this, presumably, was his primary purpose in exacting from the grantee a covenant to pay the mortgages. The cases also attribute to the parties to such a covenant the further purpose of benefiting the holder of the

securities, and the natural scope of the covenant is extended so as to give them a right of action at law on the covenant, in case of breach, as though expressly named as covenantees. *Burr v. Beers*, 24 N. Y. 178. But the wife was not a party to the mortgages, and in no way bound to pay them. She had an interest that they should be paid without resort to the land, so that her inchoate right of dower might be freed therefrom. The husband, however, owed her no duty enforceable in law or equity to pay the mortgages to relieve her dower. The most that can be claimed is that the mortgages having (as is assumed) been executed to secure his debts, and he having procured the wife to join in them and pledge her right for their payment, he owed her a moral duty to pay the mortgages, and thereby restore her to her original situation. But according to our decisions no legal or equitable obligation, of which the law can take cognizance, was created in favor of the wife against the husband or his property by these circumstances. She was not in the position of a surety for her husband. Her joinder in the mortgages was a voluntary surrender of her right for the benefit of the husband, and bound her interest to the extent necessary to protect the securities. *Manhattan Co. v. Evertson*, 6 Pai. 467; *Hawley v. Bradford*, 9 Pai. 200. There is lacking in this case the essential relation of debtor and creditor between the grantor and a third person seeking to enforce such a covenant, or such a relation as makes the performance of the covenant at the instance of such third person a satisfaction of some legal or equitable duty owing by the grantor to such person, which must exist according to the cases in order to entitle a stranger to the covenant to enforce it. It is not sufficient that the performance of the covenant may benefit a third person. It must have been entered into for his benefit, or at least such benefit must be the direct result of performance and so within the contemplation of the parties, and in addition the grantor must have a legal interest that the covenant be performed in favor of the party claiming performance. *Garnsey v. Rogers*, 47 N. Y. 233; *Vrooman v. Turner*, 69 N. Y. 280; *Lorillard v. Clyde*, 122 N. Y. 498. The application of the doctrine of *Lawrence v. Fox*, 20 N. Y. 268, to this case would extend it much further than hitherto, and this cannot be permitted in view of the repeated declarations of the Court that it should be confined to its original limits.

The order should be affirmed, and judgment absolute ordered for the defendant with costs.

All concur.

Order affirmed and judgment accordingly.

CLARA H. BORDEN AND ANOTHER v. JOHN W.
BOARDMAN.IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS,
NOVEMBER 25, 1892.*[Reported in 157 Massachusetts Reports 410.]*

CONTRACT. Trial in the Superior Court, before Braley, J., who reported the case for the determination of this Court in substance as follows :

On July 24th, 1890, Daniel J. Collins, a contractor, made a contract in writing with the defendant to build him a house in New Bedford, for the sum of \$2650, payable one half when the house was ready for plastering, the balance when finished. The defendant advanced to Collins \$200 before the first payment was due, taking his receipt therefor. During the progress of the work, and before the first payment became due according to the terms of the contract, the building was blown off the foundation. Collins employed the plaintiffs, who were building movers, to put the building back, under an agreement that it should not cost more than \$150 ; the plaintiffs put the building back, finishing the moving a month or six weeks prior to the first payment. Collins then proceeded with the work, and got the building ready to plaster. When the time for the first payment arrived the defendant told Collins he would like to have all persons who had lienable bills against the house present to see that they were paid. The plaintiffs were not present, so the defendant asked Collins how much was due them, and was told \$150. The defendant thereupon, at the request and with the consent of Collins, reserved \$200 for the plaintiffs, saying he would hold this money to pay them with, and would pay them himself. Collins thereupon gave the defendant a receipt for \$1125, as first payment on the house. Neither Collins nor the defendant informed the plaintiffs of the holding of this money, but in consequence of what a third person told Manchester, one of the plaintiffs, Manchester called upon the defendant, and said to him, " I understand that you are holding my money for me for moving that building back. Is that so ? " Boardman replied that it was. Manchester then said, " I am glad that you have got it and will pay it. " Boardman said, " I don't know as I will now, I have been advised not to. " No other interview was had between the plaintiffs and the defendant.

The defendant claimed that, upon this evidence, the action could not be maintained, and offered to show, in bar of the action, that, a day or so after the time of the first payment, Collins abandoned and broke his said contract, and the defendant was obliged to finish the building at a loss, and that at the time of refusing to pay Manchester, he, Manchester, was told by the defendant that Collins had broken his contract ; and that on December 9th, 1890, after refusal to pay them by the defendant, the plaintiffs commenced an action against said Collins for the recovery of the claim now in suit. The evidence was excluded. The judge directed a verdict for the plaintiffs for \$150, and interest from the date of the writ. If the ruling was right, then judgment was to be entered on the verdict ; otherwise, judgment for the defendant.

F. A. Milliken for the defendant.

E. L. Barney for the plaintiffs.

MORTON, J. The evidence offered in bar was rightly excluded. The subsequent failure of Collins to perform his contract would not release the defendant from the obligation, if any, which he had assumed to the plaintiffs, in the absence of any agreement, express or implied, that the money was to be paid to the plaintiffs only in case Collins fulfilled his contract. *Cook v. Wolfendale*, 105 Mass. 401. There was no evidence of such an agreement.

The other question is more difficult. The case does not present a question of novation, for there was no agreement among the plaintiffs, Collins, and the defendant that the defendant should pay to the plaintiffs, out of the money in his hands and due to Collins, a specific sum, and that thenceforward the defendant should be released from all liability for it to Collins, and should be liable for it to the plaintiffs. Neither was there any agreement between the plaintiffs and the defendant that the latter would pay the money to them. The conversation between one of the plaintiffs and the defendant cannot be construed as affording evidence of such an agreement. Coupled with the defendant's admission that he was holding money for the plaintiffs was his repudiation of any liability to the plaintiffs for it. Neither can it be claimed that there was an equitable assignment of the amount in suit from Collins to the plaintiffs. There was no order or transfer given by him to them ; nor was any notice of the arrangement between him and the defendant given by him to the plaintiffs. *Lazarus v. Swan*, 147 Mass. 330. The case upon this branch, therefore, reduced to its simplest form, is one of an agreement between two parties, upon sufficient consideration it may be between them, that one will

pay, out of funds in his hands belonging to the other, a specific sum to a third person, who is not a party to the agreement, and from whom no consideration moves. It is well settled in this State that no action lies in such a case in favor of such third party to recover the money so held of the party holding it. *Exchange Bank v. Rice*, 107 Mass. 37, and cases cited. *Rogers v. Union Stone Co.*, 130 Mass. 581; *New England Dredging Co. v. Rockport Granite Co.*, 149 Mass. 381; *Marston v. Bigelow*, 150 Mass. 45; *Saunders v. Saunders*, 154 Mass. 337. Certain exceptions which were supposed to exist have either been shown not to exist, or have been confined within narrower limits. *Exchange Bank v. Rice* and *Marston v. Bigelow*, *ubi supra*.

We have assumed that the sum which the defendant agreed with Collins to pay the plaintiffs was specific. But it is to be observed that the agreement between the plaintiffs and Collins was that it should not cost more than \$150 to put the building back. Collins told the defendant that that sum was due to the plaintiffs. The defendant reserved \$200. It may well be doubted, therefore, whether the defendant had in his hands a specific sum to be paid to the plaintiffs, or whether he agreed with Collins to hold and pay the plaintiffs a specific sum. If the sum was not specific, the plaintiffs do not claim, as we understand them, that they can recover.

Judgment for the defendant.

S. M. BARNES v. HEKLA FIRE INSURANCE COMPANY.

IN THE SUPREME COURT OF MINNESOTA, DECEMBER 29, 1893.

[*Reported in 56 Minnesota Reports 38.*]

APPEAL by defendant, the Hekla Fire Insurance Company of St. Paul, from an order of the District Court of Ramsey County, John W. Willis, J., made May 15th, 1893, sustaining a demurrer to its second and third answers in the action.

The complaint of Mrs. S. M. Barnes stated that on April 10th, 1891, defendant insured her house at Jonesboro, N. C., for three years against fire in the sum of \$1500, that the house was burned on March 11th, 1892, that she had given notice and furnished proofs, but had not been paid, and she asked judgment for the \$1500.

The defendant answered admitting the insurance and the fire,

but denying any knowledge as to the other facts alleged. For a second answer defendant alleged that the plaintiff was and is a citizen and resident of North Carolina and not of Minnesota, and that the District Court has no jurisdiction of the parties to the action or of the subject-matter thereof. For a third answer defendant alleged that the St. Paul German Insurance Company reinsured the property and agreed with the plaintiff and defendant before the fire to pay plaintiff any loss she might suffer under the policy. That the St. Paul German Insurance Company thereafter on April 14th, 1892, being insolvent, made an assignment of all its property under Laws 1881, ch. 148 as amended, to Jacob F. Franzen in trust for its creditors and that plaintiff proved and filed her claim against it with him for payment in the due course of the insolvency proceedings.

The plaintiff demurred to the second and third answers and specified as ground of objection that they do not state facts sufficient to constitute a defence. The trial Court sustained the demurrer and defendant appeals.

C. D. & Thomas D. O'Brien for appellant.

B. H. Schriber for respondent.

VANDEBURGH, J. The plaintiff demurred to the second and third defences set up in the defendant's answer, and this appeal is from the order sustaining the demurrer.

The action is brought upon a policy of insurance issued by the defendant to the plaintiff for a loss covered thereby. It is alleged, by way of defence, that subsequent to the date of plaintiff's policy the St. Paul German Insurance Company, a corporation lawfully doing business in this State, had "reinsured the said policy, and promised and agreed with the said plaintiff and this defendant to pay to the plaintiff any loss which she might suffer under said policy, and said agreement was in full force and effect at the time of the pretended occurrence of the fire described in the complaint, if any such fire did occur, and that said plaintiff had always full notice and knowledge thereof." It further appears that thereafter, and before the commencement of this action, the St. Paul German Insurance Company duly made an assignment under the insolvency laws of the State, and that the plaintiff has duly filed and proved her claim in the insolvency proceedings for the loss indemnified against by defendant, and so assumed by the German Insurance Company. It is claimed by the defendant in this action that, by electing to proceed against the estate of the German Insurance Company, the plaintiff has effectually waived her remedy against the defendant upon the policy sued on.

It will be conceded that the agreement between the two com-

panies set out in the answer is not merely a contract of reinsurance, but also to pay, and assume the payment of, losses of parties indemnified by policies issued by the defendant company reinsured. Reinsurance is a mere contract of indemnity, in which an insurer reinsures risks in another company. In such a contract the policy-holders have no concern, are not the parties for whose benefit the contract of reinsurance is made, and they cannot, therefore, sue thereon. But the agreement alleged in this case is not a mere reinsurance of the risks by the reinsurer, but it embraces also an express agreement to assume and pay losses of the policy-holder, and is therefore an agreement upon which he is entitled to maintain an action directly against the reinsurer. *Johannes v. Phenix Ins. Co.*, 66 Wis. 50 (27 N. W. 414).

This is not, however, a case where the insurer is put to an election between his remedies against the two companies.

Unless there was a substitution of debtors, in the nature of a novation, between the three parties, upon the plaintiff's consent to the new agreement, the plaintiff has not waived or lost her right of action against the defendant. A creditor is put to an election only where his remedies are inconsistent, and not where they are consistent and concurrent. In the latter case a party may prosecute as many as he has, as in the case of several debtors. And so, if, in this instance, the remedy against the insolvent company, as respects the plaintiff, was merely cumulative, there is no reason why she may not pursue either or both. As between the two companies, the defendant occupies no better position than a surety. It is not like the case of a former suit pending between the same parties. She may have an action against each at the same time, but only one satisfaction; and to this end the Court may interpose by a stay when found necessary. But an action against the party primarily or originally liable in such cases may be necessary, in order to save rights under the Statute of Limitations, or for like reasons.

The new agreement between the companies referred to, which inured to plaintiff's benefit, lacks the essential elements of novation.

It is not alleged that it was mutually understood or agreed between the two companies that the liability of the defendant should be discharged, and the new promisor should be substituted and accepted as plaintiff's debtor in the place of the defendant, or that plaintiff ever assented to or adopted any such thing.

In some few cases—notably in Rhode Island—it is held that such an agreement necessarily implies an intention to substitute

the new for the original debtor, and that the creditor, in assenting to it, adopts it as a substitutional agreement. *Urquhart v. Brayton*, 12 R. I. 172; *Wood v. Moriarty*, 15 R. I. 522 (9 Atl. 427). But this, we think, is importing a stipulation into the agreement by construction which the parties have not made. It is frequently the case that the creditor consents to the arrangement as a favor, or for the convenience of his debtor; and we apprehend it would be a surprise to the parties, as well as an injustice, in many cases, if it were held to operate as a release of the original liability; and therefore it should distinctly appear, from the express terms of the agreement, or as a necessary inference from the situation of the parties, and the special circumstances of the case, that such was the intention and understanding of the parties, of which the creditor was chargeable with notice, and this is the generally accepted doctrine of the courts. 11 Amer. & Eng. Enc. Law, 889-890.

In the early case of *Farley v. Cleveland*, 4 Cow. 432, in which this remedy of a creditor, upon a promise for his benefit made to his debtor, upon a consideration moving from the latter, is elaborately considered, the fact of the subsisting liability of the original debtor is recognized, and held no obstacle to the right of recovery by the third party creditor, and such continued liability is generally assumed by the courts.

The exact ground upon which the direct liability to the creditor in this class of cases should be placed, appears to be left in doubt by the cases.

It is called the "American doctrine," because peculiar to the courts of this country, though all do not assent to it—notably those of Massachusetts.

It is an equitable rule, adopted for convenience, and to avoid circuity of action, and the formality of an assignment by the original debtor of the new agreement with him, and is strictly in accordance with the intention of the parties to the contract in creating a liability in favor of a third party creditor. *Gifford v. Corrigan*, 117 N. Y. 264-265 (22 N. E. 756). The same rule of procedure is held applicable, though not uniformly, where the grantee of a mortgagor assumes in his deed to pay off the incumbrance.

The mortgagee may proceed by action directly against the grantee, but the mortgagor still remains liable, and is held to occupy the relation of surety for the grantee, who, as between them, becomes the principal debtor. *Thorp v. Keokuk Coal Co.*, 48 N. Y. 257-258; *Klapworth v. Dressler*, 78 Am. Dec. 76-77, note.

There is no double liability. There is no dividend as yet

shown in the insolvency proceedings, and there is of course nothing to be credited upon the plaintiff's claim. The receipt of a dividend would only operate as a *pro tanto* satisfaction; and if defendant is required to pay before the dividend, it will be entitled to it, and may be subrogated to the rights of plaintiff therein, so that there need be no embarrassment in adjusting the rights of the parties.

Other questions in the case do not, we think, demand any discussion.

Order affirmed.

SECTION II.—ASSIGNEES.

Things in action, and things of that nature, as causes of suit, rights and titles of entry are not grantable over to strangers but in special cases. . . . If a man owe me money on an obligation, or the like; I cannot grant this debt to another; but I may grant a letter of attorney to another man to sue for it and receive it, or I may grant the writing itself to another, and he may cancel it or give it to the obligor. . . .

A man may give or grant his deeds, *i. e.*, the parchment, paper and wax to another at his pleasure, and the grantee may keep or cancel them. And, therefore, if a man have an obligation he may give or grant it away, and so sever the debt and it. —Sheppard's Touchstone, 240-242.

"The wisdom and policy of the sages and founders of the law," says Lord Coke, and this has often been repeated, "have provided that no possibility, right, title nor thing in action shall be granted or assigned to strangers, for that would be the occasion of multiplying contentions and suits."¹ But, in regard to choses in action, as the same doctrine has been adopted in every other state of Europe, it may be doubted whether the reason, which has been the foundation of the rule everywhere else, was not also the reason for its introduction in this country; namely, that the credit being a personal right of the creditor, the debtor being obliged toward that person could not by a transfer of the credit, which was not an act of his, become obliged toward another; and the more especially as the mode of effecting a virtual transfer which was invented by the Roman jurisconsults, namely, by constituting the assignee the mandatory of the creditor² to sue for and recover the debt in the name of the creditor,³ has also been adopted in our

¹ Lampet's case, 10 Co. 48, *a*.

² *Ibid.*; and see Cod. J. viii. 42, 1; Domat. lib. iv. tit. 4, § 3, 4.

³ See Pothier's Treatise on Contract of Sale, quoted, Story, § 1040, note.

system of jurisprudence. It may be observed that the sale of a debt, together with the security was declared to be valid by the Emperor Alexander Severus,¹ and it was evidently not an uncommon thing for debtors to assign debts owing to them by others to their own creditors ; and if notice were given to the debtor, the receipt of the assignor was no discharge : the same principle, as will be presently seen, now prevails in our system of jurisprudence.²—2 Spence's Equitable Jurisdiction, 851.

GLENN v. MARBURY.

IN THE SUPREME COURT OF THE UNITED STATES, MAY 16, 1892.

[Reported in 145 United States Reports 499.]

THE case is stated in the opinion.

Henry Wise Garnett, Conway Robinson, Jr., Charles Marshall
and *John Howard* for plaintiff in error.

Martin F. Morris for defendant in error.

HARLAN, J., delivered the opinion of the court.

This action at law was brought, March 22, 1889, by John Glenn, in his capacity as substituted trustee in a certain deed of trust made by the National Express and Transportation Company, a corporation of Virginia ; also, as trustee by virtue of an order passed by the Chancery Court of the City of Richmond, Virginia, in a suit in equity brought by William W. Glenn, suing on behalf of himself and others, creditors of that corporation. Its object was to obtain a judgment against the defendant, Marbury, for the sum alleged to be due from him under an order, in the above cause, making an assessment and call on subscribers to the stock of that company.

The facts necessary to be stated in order to show fully the grounds of the defence are as follows :

In August, 1866, Josiah Reynolds, a citizen of Maryland and a stockholder of the National Express and Transportation Company, suing on behalf of himself and all stockholders of that corporation who should come in and contribute to the expenses of the suit, brought an action in equity in the Circuit Court of the United States for the Eastern District of Virginia, against that corporation—to be hereafter, in this opinion, designated as the Express Company—and against its president, directors, and

¹ Cod. J. iv. tit. 39, 1, 3.

² Cod. J. viii. 42, 3 ; v. *infra* as to the same doctrine in the Court of Chancery.

superintendent. The bill set forth that the company had been and was then being conducted in a reckless, extravagant, and improvident manner, and that the money subscribed by the plaintiff and other stockholders had been and was being wasted and misapplied in conducting its business, chiefly in ways and for purposes that were illegal and in fraud of the rights of stockholders. The relief sought was an injunction restraining and prohibiting the company from conducting its business in the illegal and improvident manner specified in the bill. The bill, also, prayed that a receiver be appointed by the court to take possession of the property and effects, books of account, and papers of the company; that such property and effects might be sold and disposed of, and any money due the company collected by the receiver; and that an account be taken under the order of the court of its business, its debts, and liabilities paid, and the balance distributed among the stockholders. The bill particularly referred to an agreement with one Ficklin which, it was alleged, ought to be set aside as in fraud of the rights of stockholders. The defendants were duly served with process, and one of them, J. J. Kelly, the superintendent of the Express Company, filed an answer. The company appeared and adopted as its own the answer of Kelly.

On August 23d, 1866, an order of injunction was issued restraining the defendants "from collecting or taking any proceedings to collect or enforce from the complainant the payment of moneys for or on account of his stock in said company or assignments or calls thereon, either by sales of stock or otherwise, and from making any assessments upon the complainant in respect to or on account of his said stock, and also enjoining and restraining the said company, its directors, agents, and servants, from pleading, using, or applying the property, funds, effects, and credits of the said company to or for any purposes or objects other than the regular and legitimate express and transportation business for which the said company was organized, and from carrying out or fulfilling the agreement with Benjamin Ficklin, mentioned in said bill or any similar agreement with any other person, and from selling any of the shares of said stock held or owned by the complainant until the further order of this court."

The Express Company, on September 20th, 1866—having previously appeared and filed its answer in the Reynolds suit—executed to John Blair Hoge, J. J. Kelly, and C. Oliver O'Donnell, a deed assigning and conveying to them all the estate, property, rights, and credits of the company, of every kind and wherever they might be, including moneys payable to

the company, "whether on calls or assessments on the stock of the company," or on notes, bills, accounts, or otherwise. The deed was made on certain trusts, among others, that the trustees should permit the Express Company to remain in the possession and use of all the property conveyed or assigned, except debts, claims, and moneys payable, until November 1st, 1866, and thereafter until the trustees should be requested by one or more of the creditors secured by the deed, and whose debt or debts should then be due, to take possession of the assigned property: the trustees, however, to take possession at any time, if requested by the company's board of directors. The trustees were required by the deed to proceed without unnecessary delay "to collect all the debts, claims, and moneys payable, which are hereby granted or assigned."

On December 31st, 1866, the court appointed a receiver of the money, property, and effects of the Express Company, "with all the powers, rights, and obligations usual in such cases, subject to the control of this court, until the affairs of said company be fully and finally closed up." He was ordered to execute and file, before entering upon his duties, a bond, with sureties to be approved by the court, of \$20,000, conditioned for the faithful discharge of his duties as receiver of the funds, property, and effects of the Express Company. It was further provided in the order appointing the receiver as follows:

"That upon the execution, approval, and filing of said bond the said receiver shall be vested with all the estate, real and personal, as well as all the money, notes, accounts, assessments due on stock or other securities, or rights in action of the said National Express and Transportation Company, as trustee of such estate and property, for the use and benefit of the creditors of said company and of its stockholders and others who may be interested in the same, with all the powers, rights, and authority of a trustee appointed by this court or acting within its jurisdiction and control.

"Such receiver shall have all the powers and authority which ordinarily belong to such trustee, and the said defendants, as well as all other persons who may have the possession or control of any of the money, books, property, effects or things in action of the said National Express and Transportation Company, and especially John Blair Hoge, John J. Kelly, and C. Oliver O'Donnell, the trustees named in a pretended assignment referred to in the complainant's petition, are hereby required to assign, transfer, and deliver to the said trustee, on being notified of this order, all such money, property, notes, bonds, estate, real and personal, so in their hands or under

their control, and they are also required to execute and deliver all deeds, conveyances, releases, transfers, or acquittances that may in anywise be necessary to place any or all of said property or effects so in the hands or under the control of the said receiver, and they and each of them, on being required, shall make all discovery and furnish all information which the said receiver may require in relation to any or all of the property, business or transactions of the said company.

"The said receiver will proceed to collect all the property, money and effects of the said National Express and Transportation Company and convert the same into money, and he will also ascertain the amount of the debts and liabilities of the said National Express and Transportation Company, and, after payment therefrom of all expenses, including counsel fees and costs, with such compensation as the court may allow him, will, from time to time, apply the funds so received and obtained by him in the satisfaction and discharge of the debts of the said company under the orders of this court.

"And if there shall be any sums due upon the shares of the capital stock of the said company the said receiver will proceed to collect and recover the same, unless the persons from whom the said sums may be due shall be wholly insolvent, and for this purpose may prosecute actions at law or in equity for the recovery of such sums in his own name as receiver or otherwise as he may deem best, and shall apply the money so received under the order of this court to the satisfaction and payment of the remaining debts of said company, as well as the legal and necessary expenses of the due execution of this trust, including a reasonable compensation and commission to himself for services on this behalf and also including such necessary and reasonable fees and costs as may be necessary in maintaining, prosecuting, or defending any suit or suits which it may be necessary to prosecute or defend in order to the full execution of this trust."

The receiver gave the required bond, and it was approved by the court on January 12th, 1867.

Reynolds having died, Washington Kelley, a stockholder, was permitted to become a party plaintiff and, with the leave of the court, filed August 20th, 1870, an amended and supplemental bill. The receiver reported to the court, December 11th, 1880, that he had not been able to obtain possession of any of the company's effects, except two freight cars, and that so far as he could ascertain, in all the States where the company did business, its property and effects had been attached by its creditors. This report being made, "on motion of the defendants John Blair

Hoge and J. J. Kelly," the order appointing the receiver was vacated, annulled, and set aside, the receiver discharged and exonerated, the injunction dissolved, and the suit dismissed.

On December 4th, 1871, W. W. Glenn, suing on behalf of himself and all other creditors of the Express Company, filed his bill in equity, in the Chancery Court of the City of Richmond against that corporation, and its officers, and against the trustees named in its deed of September 20th, 1866. The object of that suit was to collect the assets of the company, including the amounts due from the subscribers to its stock. The proceedings in that cause are fully set out in *Hawkins v. Glenn*, 131 U. S. 319. It is only necessary now to state that in the progress of that suit an order was entered December 14th, 1880, sustaining the validity of the deed of assignment of September 20th, 1866, removing the surviving trustees named in it, with their consent, and substituting in their place John Glenn, who was clothed by that order, "with all the rights and powers, and charged with all the duties of executing the trusts of said deed to the same effect as were the original trustees therein;" Glenn, however, not to take possession of the property covered by the deed, until he gave bond with security for the faithful discharge of his duties as substituted trustee. He gave such bond January 3d, 1881, and it was approved by the court.

By the same order a call and assessment of thirty per cent. of the par value of each share of stock was made upon stockholders, who were required to make payment to John Glenn, substituted trustee. By a decree entered July 21st, 1883, it was adjudged "that John Glenn, trustee, on the payment to him, within six months from the date of this decree, by any of the subscribers to the stock of the defendant company, or by any other person claimed to be liable on account of said stock, of twenty-five per centum of the original amount of said subscription, with interest thereon at the rate of six per centum per annum, from thirty days from the date of this decree, with any costs incurred heretofore or by said trustee in any suit brought by him heretofore, or which may hereafter be brought before tender of said twenty-five per cent. under this decree, to recover of such stockholder or other party, the amount for which he may be responsible on said stock under the decree in this cause, shall execute a receipt therefor to operate as a full acquittance and discharge of all persons on account of such subscription, both of the original subscribers thereto, and of any assignee thereof." By another order, made March 26th, 1886, in the Circuit Court of Henrico County, Virginia—to which the cause was removed in 1884—an additional call and assessment of fifty

per cent. of the par value of each share of stock was made upon stockholders, who were severally required to pay the said amounts hereby called for and assessed to John Glenn, he being "authorized and directed to collect and receive said call and assessment, and to take such prompt steps to that end, by suit or otherwise, and in such jurisdictions as he may be advised."

Marbury, it is admitted, was an original subscriber for 100 shares of the company's stock, for which he received a certificate, paying twenty per cent. only on his subscription. The object of the present suit is to recover from him the sum of \$5000, by reason of the above call and assessment of fifty per cent., with interest at the rate of six per cent. per annum from March 26th, 1886, the date of the order making such call and assessment. He pleaded that the plaintiff, as trustee, had no right to sue in the court below in his own name or otherwise.¹

* * * * *

The other question—as to the right of the plaintiff, in virtue of the authority conferred upon him by the Virginia court, to bring the present action in his own name as trustee, is a more serious one. In *Jackson v. Tiernan*, 5 Pet. 580, 597, 599, Story, J., speaking for the court, said that "the general principle of law is, that choses in action are not at law assignable. But, if assigned, and the debtor promises to pay the debt to the assignee, the latter may maintain an action for the amount against the debtor, as money received to his use. Independently of such promise, there is no pretence that an action can be sustained." After referring to some adjudged cases, which he said were distinguishable from the one then before the court, he proceeded: "They are either cases where there was an express promise to hold the money subject to the order of the principal, or there was an implied promise to pay it over as it was received to the use of a particular person. The express promise to pay to order bound the party, and excluded any claim for a lien, and any defence for want of privity between him and the holder of the order. The receipt of the money for the use of a particular person necessarily imported a promise or obligation to hold it in privity for such person."

In *Pritchard v. Norton*, 106 U. S. 124, 130, Matthews, J., delivering judgment, said: "Whether an assignee of a chose in action shall sue in his own name or that of his assignor is a technical question of mere process, and determinable by the law of the forum; but whether the foreign assignment, on which the plaintiff claims, is valid at all or whether it is valid

¹ Only so much of the opinion is given as relates to this question.—ED.

against the defendant, goes to the merits and must be decided by the law in which the case has its legal seat. Wharton, *Conflict of Laws*, §§ 735, 736." And in *New York Guaranty Co. v. Memphis Water Co.*, 107 U. S. 205, 214, the court, speaking by Bradley, J., said: "We have lately decided, after full consideration of the authorities, that an assignee of a chose in action, in which a complete and adequate remedy exists at law, cannot, merely because his interest is an equitable one, bring a suit in equity for the recovery of the demand. *Hayward v. Andrews*, 106 U. S. 672.¹ He must bring an action at law in

¹ It is admitted that, according to the rule declared and established in *Root v. Railway Company*, 105 U. S. 189, the patentee could not, in his own name and right, maintain the present suit, and the original bill was accordingly dismissed as to him. To permit the appellant to proceed in equity, upon the mere ground of the assignment to him, would be substantially to abrogate that rule. The principle was stated to be that the relief granted to a patentee in equity, by the recovery of profits and damages against an infringer, was "incidental to some other equity, the right to enforce which secures to the patentee his standing in court;" that "the most general ground for equitable interposition is to insure to the patentee the enjoyment of his specific right by injunction against a continuance of the infringement; but that grounds of equitable relief may arise other than by the way of injunction;" and among these, by way of illustration, was mentioned that "where the title of the complainant is equitable merely;" but it is the obvious meaning of the passage to limit the exception to cases where the purpose and necessity of the resort to a Court of Chancery are to enforce the peculiar equity personal to the complainant, and not merely the legal right of which he is the beneficial owner. If the assignee of the chose in action is unable to assert in a court of law the legal right of the assignor, which in equity is vested in him, then the jurisdiction of a Court of Chancery may be invoked, because it is the proper forum for the enforcement of equitable interests, and because there is no adequate remedy at law; but when, on the other hand, the equitable title is not involved in the litigation, and the remedy is sought merely for the purpose of enforcing the legal right of his assignor, there is no ground for an appeal to equity, because by an action at law in the name of the assignor the disputed right may be perfectly vindicated, and the wrong done by the denial of it fully redressed. To hold otherwise would be to enlarge the jurisdiction of courts of equity to an extent the limits of which could not be recognized, and that in cases where the only matters in controversy would be purely legal rights.

In opposition to this view, a passage from Story, *Eq. Jur.*, sect. 1057 *a*, is cited and relied on in argument, in which that learned author, after stating that it had been "recently held that the assignee of a debt, not in itself negotiable, is not entitled to sue the debtor for it in equity, unless some circumstances intervened which show that his remedy at law is, or may be, obstructed by the assignor," adds, that "this doctrine is apparently new, at least, in the broad extent in which it is laid down, and does not seem to have been generally adopted in America. On the contrary, the more general principle established in this country seems to be, that wherever an assignee has an equitable right or interest in a debt or other

the name of the assignor to his own use. This is true of all legal demands standing in the name of a trustee, and held for the benefit of *cestuis que trust*. Besides the authorities cited in that case, reference may be made to Mitford on Pleading, 123, 125; Willis's Equity Plead. 435, note g; Adair v. Winchester, 7 Gill & Johns. 114; Mosely v. Boush, 4 Rand. Va. 392; Doggett v. Hart, 5 Fla. 215; Smiley v. Bell, Mart. & Y. Tenn. 378; and the English and American notes to Ryall v. Rowles, 1 Ves. Sen. 348, and to 2 White & Tudor's Leading Cases in Equity, pp. 1567, 1670 (ed. 1877)."

property (as the assignee of a debt certainly has), then a court of equity is the proper forum to enforce it; and he is not to be driven to any circuity by instituting a suit at law in the name of the person who is possessed of the legal title." In the next paragraph, however, it is admitted that, "if the assignment be of a contract involving the consideration and ascertainment of unliquidated damages, as in case of the assignment of a policy of insurance, then, unless some obstruction exists to the remedy at law, it would seem that a court of equity ought not, or might not, interfere to grant relief; for the facts and the damages are properly matters for a jury to ascertain and decide. But the same objection would not lie to an assignment of a bond or other security for a fixed sum."

The doctrine referred to in this passage, as "apparently new," is that stated by Vice-Chancellor Shadwell, in *Hammond v. Messenger*, 9 Sim. 327, 332, where he said: "If this case were stripped of all special circumstances, it would be simply a bill filed by a plaintiff, who had obtained from certain persons to whom a debt was due, a right to sue in their name for the debt. It is quite new to me, that, in such a simple case as that, this court allows, in the first instance, a bill to be filed against the debtor by the person who has become the assignee of the debt. I admit that if special circumstances are stated, and it is represented that notwithstanding the right which the party has obtained to sue in the name of the creditor, the creditor will interfere and prevent the exercise of that right, this court will interpose for the purpose of preventing that species of wrong being done; and if the creditor will not allow the matter to be tried at law in his name, this court has a jurisdiction in the first instance to compel the debtor to pay the debt to the plaintiff, especially in a case where the act done by the creditor is done in collusion with the debtor. If bills of this kind were allowable, it is obvious they would be pretty frequent; but I never remember any instance of such a bill as this being filed, unaccompanied by special circumstances."

And, accordingly, the Supreme Judicial Court of Massachusetts, in *Walker v. Brooks*, 125 Mass. 241, held, that "a court of equity will not entertain a bill by the assignee of a strictly legal right, merely upon the ground that he cannot bring an action at law in his own name, nor unless it appears that the assignor prohibits and prevents such an action from being brought in his name, or that an action so brought would not afford the assignee an adequate remedy." And Gray, C. J., delivering its opinion in that case, referring to the passage from Story to the contrary, said: "But the adjudged cases, including those cited by the learned commentator, upon being examined, fail to support his position, and show that the doctrine of *Hammond v. Messenger* is amply sustained by earlier authorities in England and in this country." This conclusion he then verifies by a

The right which the Express Company acquired by the defendant's subscription to its capital stock was only a chose in action. It passed by the deed of September 20th, 1866, to the trustees Blair, Kelly, and O'Donnell, but subject to the condition that a chose in action is not assignable so as to authorize the review of the cases from the time of Lord Chancellor King, whose decision in *Dhegetoft v. London Assurance Co.*, Mos. 83, was affirmed in the House of Lords; 4 Bro. P. C. (2d ed.) 436; followed by Lord Hardwicke, in *Motteux v. London Assurance Co.*, 1 Atk. 545; and Lord Loughborough, in *Cator v. Burke*, 1 Bro. Ch. 434, to Vice-Chancellor Knight Bruce, in *Rose v. Clark*, 1 You. & Col. C. C. 534; and in this country from *Carter v. United Insurance Co.*, 1 Johns. (N. Y.) Ch. 463, by Chancellor Kent; and *Ontario Bank v. Mumford*, 2 Barb. (N. Y.) Ch. 596, 615, by Chancellor Walworth; including several others in various States. He then points out that in *Riddle v. Mandeville*, 5 Cranch, 322, the principal case cited by Story, J., in support of his statement, a bill in equity by an indorsee of a promissory note against a remote indorser was sustained by this court, upon the ground that in Virginia, the law of which governed the case, no remedy at law could be had against him, except by the circuitous course of successive actions by each indorsee against his immediate indorser, and that, in that particular case, the intermediate party was insolvent; and that Chief Justice Marshall, who delivered the opinion in that case, did not consider it as establishing the general proposition for which it was cited was manifest from his opinion in the later case of *Lenox v. Roberts*, 2 Wheat. 373, in which the assignee of all the property of a banking corporation was allowed to maintain a bill in equity in his own name upon a promissory note which had not been formally indorsed to him for the reason that "as the act of incorporation had expired no action could be maintained at law by the bank itself."

The same doctrine had received a pointed application by this court in the case of *Thompson v. Railroad Companies*, 6 Wall. 134. That case was commenced in the State court in Ohio by the parties in interest in their own name, although only beneficially entitled, in accordance with the code of the State. It was removed into the circuit court, where the plaintiffs filed a bill in equity, because their title was equitable merely. A decree in their favor, on appeal, was reversed by this court. Davis, J., remarking, in the opinion, that "this case does not present a single element for equitable jurisdiction and relief," and added: "The absence of a plain and adequate remedy at law is the only test of equity jurisdiction, and it is manifest that a resort to a Court of Chancery was not necessary, in order to enable the railroad companies to collect their debt."

That decision has been cited with approval in the subsequent cases of *Walker v. Dreville*, 12 Wall. 440; *Van Norden v. Morton*, 99 U. S. 378; and *Hurt v. Hollingsworth*, 100 U. S. 100.

In the present case, the complainant had a plain and adequate remedy at law by an action in the name of Allen, whose willingness to permit his name to be so used, in accordance with his agreement to that effect, is manifest, from the fact that in the original bill he was named as one of the complainants. There was, therefore, no error committed by the circuit court in dismissing the amended bill for want of jurisdiction in equity. Decree affirmed.—*Matthews, J., Hayward v. Andrews*, 106 U. S. 672, 675-679.—Ed.

assignee to sue at law, in his own name, unless the right to do so is given by a statute, or by settled law, in the jurisdiction where suit is brought. This is the well-established rule of the common law, and the common law touching this subject governs in the District of Columbia. If the trustees named in the deed of 1866 had sued in this District for sums due upon calls or assessments on stock, they must have sued in the name of the Express Company for their use, unless the stockholders expressly promised to pay them, or unless such a promise could be implied as matter of law. There was no such express promise by Marbury, although he concurred in the assignment made by the company to those trustees.

But it is said that stockholders must be presumed to assent to every lawful disposition made of its property by the corporation. When this point was made in *Glenn v. Busey*, 5 Mackey, 243, it was fully met by Cox, J., speaking for the court. After observing that a stockholder in a corporation holds a double relation to it; that, in his capacity as debtor, he has not promised to pay to the company's order or to its assignee, but to the company only; and that as stockholder he would not be held to have given more than the general authority to the corporation to deal with its property, he said: "If we go further than this, we must hold that the mere fact of being a stockholder in a corporation makes his indebtedness a negotiable one, even against the terms of his agreement with the company and the intention of the parties. Thus, if a stockholder borrowed money from the company on his sealed bond, the argument would be that as his bond is a part of the assets of the company, and he has generally and impliedly assented to the assignment or negotiation of its property, as it may think best, *ergo*, his bond may be negotiated like a promissory note. But this reasoning would not stop at corporations. It would apply equally to partnerships. Each member of a partnership is the agent of all, and all the others are the agents of each, and all or each would have authority to settle debts by the assignment of property of the firm. If, then, one becomes indebted to the firm on an open account, the firm, on the principles before mentioned, could assign or negotiate the debt, and so give the assignee a right of action in his own name. In such action the plaintiff, after stating the original indebtedness and its assignment, which would make a demurrable case, would only have to supplement it by an averment that the debtor was a member of the firm who made the assignment, and his case would be complete. It is hardly necessary to say that this would be a novelty in the law of contracts and actions and

pleadings, for which not a semblance of authority could be found."

Is the question as to the right of the trustee Glenn to bring this suit, in his name, any different by reason of the fact that the Virginia court made the call or assessment in question, substituted the plaintiff as trustee in the place of Blair, Kelly, and O'Donnell removed, and both authorized and directed him to collect and receive such call or assessment, taking steps to that end by suit or otherwise, and in such jurisdiction as he might be advised? We think not. Undoubtedly the Express Company, having refused or neglected to make the necessary call or assessment, a court of equity could itself make it, if the interest of creditors required that to be done. In other words, as said in *Scovill v. Thayer*, 105 U. S. 143, 145, and repeated in *Hawkins v. Glenn*, 131 U. S. 335, "the court will do what it is the duty of the company to do." See, also, *Glenn v. Williams*, 60 Maryland, 93, 113, 114. But the making of the call or assessment by the court, for the company, does not, in the absence of some statutory provision on the subject, change the rule that a demand upon the stockholder to meet a call or assessment, by competent authority, must be enforced in the name of the person or corporation holding the legal title to the stock subscription, and to whom the promise of the stockholder was made. There is no reason why the trustee Glenn could not have sued in the name of the company. For, as said in *Hawkins v. Glenn*, concurring with the Supreme Court of Appeals of Virginia in *Hamilton v. Glenn*, 85 Virginia, 901, 905, "as this corporation, notwithstanding it may have ceased the prosecution of the objects for which it was organized, could still proceed in the collection of debts, the enforcement of liabilities, and the application of its assets to the payment of its creditors, all corporate powers essential to those ends remained unimpaired."

We concur entirely in the views expressed by Cox, J., speaking for the court, in *Glenn v. Busey*, where will be found a careful and elaborate discussion of this question.¹ In

¹ This then is simply a debt to the corporation, a chose in action. And the plaintiff, Glenn, is confronted at the outset by the defendant's objection that his debt could not be assigned by the corporation so as to give to any assignee the right to sue the defendant in his own name.

Undoubtedly the common law is so.

The express company could not have made a specific assignment of this subscription with that effect; nor is the legal result changed by embracing this unpaid subscription in a general assignment of all the assets of the company. It is still, *quoad* this debt, simply an assignment of a chose in action. Whatever effect is given by statute to an assignment by operation of law, as in bankruptcy, it still remains true that a voluntary assignment,

harmony with the decision in that case, we hold that the present suit cannot, consistently with the principles of the common law—which is the law, upon this question, for the District of Columbia—be maintained by the plaintiff in his own name, as trustee. We are aware that a different rule obtains in some jurisdictions where the common law has been modified by statute or by a settled course of decisions, but we are unable to hold that the law of this District is otherwise than has been indicated in this opinion.

Judgment affirmed.

whether general or specific, of a chose in action, can transfer only the equitable interest in it, so as to enable the assignee to sue in the name of the assignor for his use.

How the force of this objection is felt by the plaintiff's counsel is indicated by the ingenious reasoning employed to obviate it.

It is said that this undertaking of the stockholder is not a consummated contract until a certain condition happens, viz., the call on him for payment by the president and directors; and when that call took place in the present case the debt had become the property of another, to wit, the trustee; and therefore when it became a complete indebtedness it was due to the trustee.

But this assumes the whole question. Whether complete or incomplete, the indebtedness was nothing more than a chose in action; and the very question is how and to what extent it became the property of the assignee, and to this question apply all the considerations just enunciated.

But besides it is an error to speak of the contract as not consummated and complete before the money was payable. At least from the moment when the corporation came into being, the subscription was a complete contract. The payment, it is true, was not to be made until called for, but it was none the less a promise to pay to the company when called upon; and the call for payment could make no change in the parties to the contract.

Perhaps the most ingenious argument is derived from the admitted rule that an assignment of a chose in action, with the right of action on it, may be made if the debtor assents to it and promises to pay to the assignee.

It is attempted to apply this rule to the present case by arguing that every stockholder is presumed to assent to every disposition of the corporate property made by the corporation.

It is not pretended that the defendant's testator ever specifically assented to the assignment of his indebtedness; but reliance is placed only on the general authority which the law implies from the stockholders to their common agent, the corporation, to use the property of the concern in the conduct and settlement of its business, which, it is claimed, would include the power to assign it in payment of debts.

But this does not advance us a step. Whether the power thus to deal with the property be said to be given by the law or to rest upon an implied assent or authority of the stockholders, it cannot amount to more than an authority to deal with the property in such manner as the subject-matter will admit of; in other words, to make such assignments as the nature of the property will allow, which, in the case of choses in action would be merely equitable.

In the case of choses in action, consisting of debts due by strangers, the stockholders could not authorize any other assignment of them than the law

CHARLES DEVLIN, APPELLANT, *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, *et al.*, APPELLANTS.

IN THE COURT OF APPEALS OF NEW YORK, OCTOBER 5, 1875.

[*Reported in 63 New York Reports 8*]

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order reversing a judgment in favor of plaintiff entered upon the report of a referee, and directing judgment absolute in favor of defendant The Mayor, etc.

permits, as before explained. In the case of debts due by the stockholders themselves, why should a different presumption exist or a different rule apply?

The stockholder occupies a double relation to the company. *Qua* debtor, he has not promised to pay to the company's order or to its assignee, but to the company only. *Qua* stockholder, he cannot be held to have given more than the general authority to the corporation to deal with its property, which I have already mentioned, and which is consistent with the rules of law as to choses in action.

If we go further than this, we must hold that the mere fact of being a stockholder in a corporation makes his indebtedness a negotiable one, even against the terms of his agreement with the company and the intention of the parties. Thus, if a stockholder borrowed money from the company on his sealed bond, the argument would be that as his bond is a part of the assets of the company and he has generally and impliedly assented to the assignment or negotiation of its property, as it may think best, ergo, his bond may be negotiated like a promissory note.

But this reasoning would not stop at corporations. It would apply equally to partnerships. Each member of a partnership is the agent of all, and all the others are the agents of each, and all or each would have authority to settle debts by the assignment of property of the firm. If, then, one becomes indebted to the firm on an open account, the firm, on the principles before mentioned, could assign or negotiate the debt, and so give the assignee a right of action in his own name. In such action the plaintiff, after stating the original indebtedness and its assignment, which would make a demurrable case, would only have to supplement it by an averment that the debtor was a member of the firm who made the assignment, and his case would be complete. It is hardly necessary to say that this would be a novelty in the law of contracts and actions and pleadings, for which not a semblance of authority could be found.

The decree in the Chancery Court of Richmond cannot affect the question. We have no doubt of the right of the corporation to make a general assignment of all its assets, which would include an equitable assignment of its choses in action, to trustees, for the benefit of creditors without the concurrence of the stockholders. Nor do we doubt the authority of any court, having obtained jurisdiction over the corporation to require it to do what it might do voluntarily, to decree a transfer of its assets to a trustee

This action was brought by plaintiff, as assignee of an interest in a contract, made between the corporation of the city of New York and one Andrew J. Hackley, under the act (chap. 309, Laws of 1860) for cleaning the streets of said city. The other defendants, it was alleged, claimed interest in the contract, but refused to join as plaintiffs.

By the contract, which was made February 26th, 1861, the contractor agreed to sweep all the paved streets, avenues, lanes, alleys, etc., in said city at least once a week, Broadway once every twenty-four hours, and some other streets specified twice a week for the term of five years, and to immediately remove the sweepings.

or to remove a trustee and appoint a new one, and vest in him all the title which the corporation may have given to a former one without having the stockholders before them. Nor do we doubt the power of the court to do what the president and directors omitted to do, to wit: to make a formal call and assessment on the stockholders on account of their unpaid subscriptions for the benefit of creditors, the result of all which would be that the substituted trustee would have the right, and it would be his duty, to call on the stockholders for the assessment, and, on their refusal to pay, to institute suit against them in the name of the corporation.

This was substantially what the Chancery Court of Richmond ordered the plaintiff to do; that is, "to collect and receive the said call and assessment, and to take such prompt steps to that end, by suit or otherwise, and in such jurisdictions as he may be advised."

It is not altogether clear that the court meant to decree that he was entitled to sue in his own name or to order him to do so.

If the court is to be so understood, we do not hesitate to say that the decree is void, as to the stockholders, in this respect for want of jurisdiction, because they were not parties to the suit.

Undoubtedly in its relations to third persons, the corporation represents the stockholders, and it is not necessary to make the latter parties to a suit in order to obtain a decree or judgment against the corporation which may be enforced against the tangible corporate property.

But where rights are to be determined as between the corporation and the stockholder, where the latter have an adversary interest, and his property may be affected, it is evident that no decree can bind him in a suit to which he is not personally, instead of by representation, made a party.

For example, his indebtedness to the corporation could not be garnished by a creditor by a proceeding in the common law courts or its equivalent in an equity court without serving process on him.

And, while a court might compel the corporation to make such a transfer of his debt as it might make voluntarily without his concurrence, no court could, by force of its own decree alone, convert his indebtedness to the corporation into an indebtedness to some one else without even notifying him. If it could do this, it would have little difficulty in going a step further and make a money decree against him without giving him his day in court.

We have been referred to a number of cases in which suits similar to the present have been sustained in the State and Federal courts.

But the present question does not seem to be discussed in any of the opinions rendered except in *Glenn v. Scott*, in the Circuit Court for the

The contract contained these clauses :

" When the performance of such work is impracticable from the state of the weather the city inspector may, from time to time in writing, designate a later hour for the work, or dispense with the same temporarily ; but he shall not grant such dispensation for a period longer than one week from the date thereof.

" Section 7. The streets shall be kept conveniently passable for vehicles during the winter ; and the crosswalks, and all gutters intersecting the same shall be kept clear of snow and ice."

The referee found a substantial performance of the contract up to May 16th, 1863 ; that there were certain periods of the year Western District of Virginia. In that case the declaration averred the assignment of the subscriptions of the defendant stockholder to the trustees, and that the defendant had assented to it just as in this case.

The case came before the court on a demurrer to the declaration, which admitted the plaintiff's case—as the present case did in the court below—and the court could do nothing else than render judgment against the defendants. Bond, J., also held the case to be within the code of Virginia of 1873, which, in this respect, only repeals the code of 1849, and provides that :

" The assignee of any bond, note, or writing not negotiable, may maintain an action thereon in his own name which the original obligee or payee might have brought."

If, however, it is attempted to apply that law to the present case, it is seen that a conflict of law arises. By our law, which is the common law, no such action can be maintained, and the question is whether the Virginia code or our common law is to determine the right to sue.

If the code determines the contract right of the parties and operates upon the title it must prevail if this is to be considered a Virginia contract. If it goes only to the remedy, the *lex fori* must prevail. We are relieved from any trouble upon this question by the decisions of the court of last resort of Virginia upon the effect of her code.

The following cases were decided in 1857, when the code of 1849 was still in force, and was the law governing the subscriptions in this case.

In *Davis v. Miller*, 14 Gratt., 13, the court said :

" The code declares that ' the assignee of any bond, note, or writing, not negotiable, may maintain any action thereon in his own name, which the original obligee or payee might have brought.' This section is the same in effect with 1 Revised Code, ch. 126, par. 5. It applied only to writings not negotiable, and its only effect is to authorize the assignee of such writings to sue at law in his own name. The legal title still remains in the assignor in whose name the suit at law may be brought."

The case of *Clarkson v. Doddridge*, 14 Gratt., 42, was an action by certain commissioners in chancery on a bond, for purchase money for property sold by them. The plea was that, by a subsequent decree, other commissioners had been appointed in their place, so that the bond had been by the action of the court, assigned to the latter, and the question was whether the action ought not to be brought by them. The court said :

" Was the action properly brought in the names of the commissioners to whom the bonds were payable? Or ought it to have brought in the names of the new and substituted commissioners?

when snow and ice accumulated to such an extent that the streets could not be swept or thoroughly cleaned without removing the ice and snow out of the city, at which times the contractor did not sweep once a week, but he kept the streets conveniently passable for vehicles, and kept the crosswalks and gutters at the intersection thereof clear ; that on May 16th, 1863, the corporation forbade, stopped and prevented the contractor from doing any more work under the contract, notified him that the contract was rescinded, and refused to make any further payments thereon.

Upon the trial evidence was offered, on the part of plaintiff, on the question of damages, and received under objection, show-

" It is a general rule that an action on a contract must be brought in the name of the party in whom the legal interest in such contract is vested. The legislature alone has power to make an exception to this rule. An exception is made by the Code, ch. 144, sec. 14, par. 583, which authorizes the assignee of any bond, note or writing, not negotiable, to maintain thereupon any action in his own name which the original obligee or payee might have brought. The assignee acquires only an equitable right with a capacity, expressly given him by statute, to assert it at law in his own name. But the legal title still remaining in the obligee or payee, a right of action is incident thereto ; and the assignee may, at his election, sue at law in his own name or in that of the obligee or payee for his benefit. *Garland v. Richardson*, 4 Rand., 266. Another exception seems to be made by the Code, ch. 116, sec. 2, par. 500.

" It is also a general rule that the legal interest in an obligation for the payment of money is vested in the obligee or his personal representative. The exceptions to this rule also must be derived from the statute law, and are few in number. An exception arises in England under the statute of bankruptcy, which expressly vests the bankrupt's right of property and of action in his assignees, who may therefore maintain in their own name an action on a bond payable to the bankrupt. A bond payable to a corporation aggregate is not an exception to the rule, though an action thereon must be brought in the name of the corporation, and not of the persons composing it when the bond is executed, or their personal representatives. The corporation itself, and not the persons composing it, is the obligee ; and the case therefore falls within the rule and not the exceptions. A different rule is said to be applicable to a bond payable to a person who is a corporation sole ; in which case an action at law upon the bond must, after his death, be brought in the name of his personal representative, and not of his successor. There is a strong instance of this kind in a case very recently decided by the Court of Queen's Bench, in which it was held that a bond, given to the ordinary by an administrator under the statute of distributions, passes, on the ordinary's death, to his personal representative, and not to his successor. *Howley v. Knight*, 14 Adolph. & El. 240 ; 68 Eng. C. L., 238.

" In the case under consideration, the bonds are payable to Miller and Doddridge, the old commissioners, in whom, therefore, by the very terms of the bonds, and according to the general rule of law before stated, the legal interest in and right of action on the bonds were vested. There is no law in existence which divests this legal interest and right of action. The

ing sub-contracts for portions of the work made by the contractor with other parties, and the prices for which the latter contracted to do the same.

The referee directed judgment for a balance found to have been earned under the contract at the time it was so rescinded, and for a sum determined upon as the net profits the contractor might have made under the contract had he been permitted to complete it.

Judgment was entered accordingly.

Geo. F. Comstock and D. C. Cronin for the appellants.

Dexter A. Hawkins for the respondents.

ALLEN, J. The referee has found the making of the contract as alleged, the performance thereof by Hackley, from the making thereof in February, 1861, until May, 1863, an ability, readiness and offer by him to perform the contract for the unexpired term thereof, and that he was, in May, 1863, without cause, ejected by the respondents from the work, and by them prevented from proceeding in the performance of the agreement. He has also found the amount due and unpaid for work actually done at the time of the interference by the respondents, and the damages sustained by the parties in interest by reason of the breach of the contract by the respondents. The referee court of chancery, it is true, was authorized by law to substitute new in place of old commissioners. But the effect of such substitution was not to transfer the legal interest in the bonds from the old to the new commissioners. It only authorized the new commissioners, upon giving the security required by law, to collect the bonds, and to bring suit, if necessary, for the recovery thereof, in the names of the old commissioners. The right of the new commissioners to receive the money does not imply a right to bring an action therefor in their own names. A person may have a right to receive money without any corresponding right to bring an action for it in his own name.

"This happens whenever a chose in action, not negotiable by the law merchant, and not coming under the provisions in the Code, ch. 144, sec. 14, is assigned. The assignee has a right to receive the money, but not to bring an action therefor in his own name. He has, however, an ample remedy.

"He has a right to bring an action at law in the name of his assignors; and he will be regarded, even by a court of law, as the substantial plaintiff in the action. The court will protect his rights, and will not permit the nominal plaintiff to receive the money, nor to release the debt, nor to dismiss the action. The same principle applies to this case.

"The circuit court was therefore right in saying that the present commissioners have a right to sue upon the bonds in the name of Miller and Doddridge, the obligees."

Bond, J., must have taken the same view, since he rests his opinion on the Code of 1873, which was adopted seven years after these subscriptions were made. He could hardly have held that to operate retrospectively on the contract while it clearly could on the remedy.

has not found that the contract was procured by bribery or fraud, or any fact set up by the respondents as an affirmative defence to the action, and was not requested by the respondents to find any such fact, or any fact. The Court of Common Pleas of the city of New York, from whose judgment this appeal is taken, found no error in the findings and conclusions of fact by the referee, but reversed his judgment solely for errors of law. The conclusions of the referee upon the evidence, and his findings of fact, not disaffirmed by the court below in reversing his judgment, are therefore not reviewable by this court. We are concluded upon every question of fact by the findings of the referee and the judgment of the court of original jurisdiction. Code, §§ 272, 511.

Upon the adjudged facts the plaintiff and the defendants, appellants, the assignees of Hackley were entitled to recover unless there is some legal impediment, and were entitled to retain the judgment given by the referee, unless for some reason no action at law could be maintained for the work actually performed, or upon the agreement for a breach thereof, or some material error was committed by the referee upon the trial to the prejudice of the respondents.

But two objections to the recovery against the city, the present defendant, were considered by the court below in the opinion

Apart from the Code of Virginia, it is admitted that the equitable title to a chose in action can be assigned so that the assignee may institute a suit at common law in the assignor's name for his use. According to the decisions just referred to, the Code makes no change in the title, but superadds to the remedy just mentioned a right of action by the assignee in his own name.

This, then, clearly relates to the remedy only, and the rule applies which Dr. Wharton lays down in his "Conflict of Laws," sec. 735, as follows, viz. :

"Whether an assignee can sue in his own name is sometimes a technical question, and sometimes one that is essential. When it is technical (*i. e.*, when the point is merely whether the suit is to be brought by A. to the use of B., or by B. immediately, there being no dispute that the title as between the two is virtually in B.), then the *lex fori* is to decide. It is a mere matter of process. If allowed by the *lex fori*, the assignee may sue in his own name, although forbidden by the foreign law to which the obligation is subject. If forbidden by the *lex fori*, the assignee cannot sue in his own name, though permitted to do so by the foreign law to which the obligation is subject." See, also, to the same effect, Story's Conflict of Laws, secs. 293, 332, and 473.

And so here we assume that the plaintiff is entitled to sue for the unpaid subscriptions to the extent called for, and the question is whether he shall sue in his own name or in that of the corporation to his use. By the law of this District he must do the latter, and that is the law of this case.

We have not deemed it necessary to express an opinion upon any of the other questions in the case, but judgment must be entered for the defendant.—Cox, J., Glenn *v.* Busey, 5 Mack., 233, 241-249.—ED.

annexed to the record before us, and they being regarded as insuperable and fatal to the action, the judgment of the referee was reversed and judgment absolute given for the city. These objections were: First, that the contract between the city and Hackley was not assignable, and that the assignment by the original contractor, of itself, terminated the contract and justified the action of the city authorities in refusing longer to be bound by it.¹

The first objection, if well taken, was not necessarily fatal to the action, but, at most, would only have authorized the sending of the case back for a retrial. It might have been waived by the city. There was nothing in the spirit or letter of the statute authorizing the contract, or public policy, to prohibit the assignment, with the assent of the city authorities, so long as the city retained the personal obligation of the original contractor and his sureties for its faithful performance. There was evidence which would have authorized—and had he been called upon, would have required—the referee to find a waiver of all objections, if not an express assent to the assignment now claimed to be fatal to this action, and to any recovery for work done.

Aside from dealings with, and payments to, the assignees, the common council, in their proceedings, directly recognize the fact that the interest of Hackley in the contract had passed into other hands, and in giving the notice and assigning the reasons for terminating the contract, no notice is taken of the assignment, but the sole reason alleged is the non-performance of the agreement by the contractor. The city, by the acts of its agents, waived the objection that the contract was not assignable, and the reason assigned for terminating the contract has been found to be untrue in fact. *Murray v. Harway*, 56 N. Y. 337; *Ireland v. Nichols*, 46 N. Y. 413.

There was certainly no reason why there should not have been a recovery of the moneys actually earned, even if the contract had been terminated for every other purpose. But it is palpable that the city had no thought of objecting to the further prosecution of the contract for the reason that it had been assigned, or that it was not assignable. The question, however, whether the assignment by the original contractor terminated the contract, or authorized the refusal of the city longer to be bound by it, still remains to be considered, as the waiver has not been found by the referee. An assignment by the contractor of the amounts which would have become due from the city from time to time, made before the doing of the work or

¹ Only so much of the opinion is given as relates to this objection.—ED.

the performance of the conditions upon which the payments depended, would, under the liberal rule permitting the assignment of choses in action now prevailing, be valid. Expectancies, as well as existing rights of action, may be assigned, and the rights of the assignees will be protected and enforced at law. *Field v. Mayor, etc.*, 2 Seld., 179; *Hall v. Buffalo*, 2 Abb. Ct. of App. Dec., 301. An assignment may include all contingent and incidental benefits or results of an executory contract, as well as the direct fruits or earnings under it, and thus entitle the assignee to the damages resulting from a violation of its terms. The right of action for a breach of the contract, resulting in pecuniary loss to the contractor, would survive to the personal representatives of the aggrieved party, and that is one test of the assignability of contracts and choses in action. *Byxbie v. Wood*, 24 N. Y., 607; *McKee v. Judd*, 2 Kern., 622; *Zabriskie v. Smith*, 3 Kern., 322. In principle it would not impair the rights of the assignee, or destroy the assignable quality of the contract or claim, that the assignee, as between himself and the assignor, has assumed some duty in performing the conditions precedent to a perfected cause of action, or is made the agent or substitute of the assignor in the performance of the contract. If the service to be rendered or the condition to be performed is not necessarily personal, and such as can only with due regard to the intent of the parties, and the rights of the adverse party, be rendered or performed by the original contracting party, and the latter has not disqualified himself from the performance of the contract, the mere fact that the individual representing and acting for him is the assignee, and not the mere agent or servant, will not operate as a rescission of, or constitute a cause for terminating the contract. Whether the agent for performing the contract acts under a naked power, or a power coupled with an interest, cannot affect the character or vary the effect of the delegation of power by the original contractor. Hackley, the original contractor, was at no time discharged from his obligations to the city, nor was he disqualified for the performance of the contract; but was at all times in a position to perform his part of this agreement, facts which distinguish this case from *Stevens v. Benning*, 6 De G., M. & G., 223, and *Robson v. Drummond*, 2 Barn. & Ad., 303. *Stevens v. Benning* is distinguished from the present by the additional circumstances that the contract in the case cited was in its nature personal, and was made in reference to the character and facilities of the contracting firm as a publishing house, and was in the nature of a partnership in so far as it provided for a division of the profits of the work to be pub-

lished. In *Robson v. Drummond* the defendant had agreed to pay annually in advance for the use of the carriage to be furnished by Sharpe, a coachmaker, and was not bound, after notice of his withdrawal from and assignment of the contract to Robson, to trust to the ability or integrity of the assignee; and the court also held that the contract was one for the personal service of Sharpe, and that the defendant was entitled to his judgment and taste to the end of the contract. It is not disputed that in all cases when the executor or administrator would succeed to the rights and liabilities of a deceased party to a contract, the contract is assignable by the act of the parties, the personal representatives of a decedent being regarded but the legal assignee upon whom the law devolves the rights and obligations of their testator or intestate. In one case in which the executory obligations of deceased parties have been sought to be enforced against their personal representative, the question has been said to be one of construction depending upon the intention of the parties, and that we are without any well-defined rule on the subject. *Dickinson v. Calahan's Admr.*, 19 Penn. St. Rep., 227. In some cases in which executors and administrators have assumed the contracts of their testators or intestate, and after performance sought to recover the stipulated compensation, the question has been one of pleading rather than of principle. *Edwards v. Grace*, 2 M. & W., 190. The assignability of a contract must depend upon the nature of the contract and the character of the obligations assumed rather than the supposed intent of the parties, except as that intent is expressed in the agreement. Parties may, in terms, prohibit the assignment of any contract and declare that neither personal representatives nor assignees shall succeed to any rights in virtue of it, or be bound by its obligations. But when this has not been declared expressly or by implication, contracts other than such as are personal in their character, as promises to marry or engagements for personal services requiring skill, science or peculiar qualifications, may be assigned, and by them the personal representatives will be bound. In *Hyde v. Windsor*, Cro. Eliz., 552, it was said that executors are bound by all covenants of their testator, whether named or not, "unless it be such a covenant as is to be performed by the person of the testator, which they cannot perform." If the contract be personal and the performance of the party himself be the essence thereof, it neither devolves upon his representatives, nor can it be assigned. *White's Exrs. v. Commonwealth*, 39 Penn. St., 167. When the contract is executory in its nature, and an assignee or personal representative can fairly

and sufficiently execute all that the original contractor could have done, the assignee or representative may do so and have the benefit of the contract. *Quick v. Ludbaum*, 3 Bulst., 30, adjudged a contract to build a house binding upon the executors. This case has been criticised, and sometimes its authority questioned, but the modern cases in England and the decisions of the courts of this State are in harmony with it. It is cited with approval in *Siboni v. Kirkman*, 1 M. & W., 417, and in many other cases. The act of God in the death of the party does not dissolve the contract or excuse performance, except in the case of a contract requiring personal service, and then the law will imply an exception. In the case last referred to executors were held entitled to enforce a contract for the exchange of pianos made by their testator twenty years before the bringing of the action. There may be cases in which the executor may not be compellable to perform a contract of his testator, and yet may elect to do so and entitle himself, in his representative capacity, to the compensation. *Marshall v. Broadhurst*, 1 Cr. & J., 403; S. C., 1 Tyrwhitt, 348, was for work and materials in building a house which the testator of plaintiff had agreed to build, but died before the work was begun and the plaintiffs were held entitled to recover. The court say, that in case of such a contract, if the executors do not go on they will be liable to damages for not completing the work, and if they go on they may recover as executors. See, also, *Wentworth v. Cock*, 10 A. & E., 42. In the latter case *Pattison, J.*, refers to a case at Liverpool where a contract to build a light-house was held to be personal, and therefore not assignable, but solely on the ground of its being a matter of personal skill and science, clearly implying that but for that element in the contract it would have been assignable. *Sears v. Conover*, 34 Barb., 331, was not unlike *Wentworth v. Cock*, except that the action was an action by the assignee of an executory contract for non-performance by the other party. Within the principle of the adjudications in this State this contract was assignable. The executor of the contract would have been bound to perform it to entitle him to recover what had been earned, and to prevent an action for non-performance. It was a contract not capable of being performed in person by Hackley. At most, he could only employ workmen and appoint agents and overseers of the work. The work did not require or call for the exercise of any peculiar skill, science or experience. It was by law all to be done under the directions of the city inspector, who may be supposed to have been in possession of all the local knowledge and experience essential to the general

direction of the work. It was merely the servile labor of sweeping and cleaning the streets, and removing the garbage as specified in the agreement and under the general supervision of the city inspector, that the contractor engaged for. Work upon the canals of this State, either in their repair or construction, calls for more of skill and scientific knowledge, as well as of experience, than this work could call for, and yet contracts for that class of work have been recognized as assignable by the legislature and by the courts, and the rights of assignees protected and enforced. *Munsell v. Lewis*, 2 Den., 224. So contracts for the labor of convicts in the State prisons have been expressly held assignable, and on the ground that notwithstanding the intimate personal relations that must exist between the contractor and the convict laborers, and their presence at all times within the prison walls, and their opportunities of interfering with the discipline of the prison, the contract is not personal in its character. There the general discipline and government of the prison and the prisoners was with the warden and other officers, while here, so far as any judgment or discretion is to be exercised, it was with the city inspector. The circumstance that by the statute in this case the contract was to be awarded as the common council should deem for the best interests of the city, does not distinguish this case from those referred to. This provision did not refer to the person of the contractor, but to the terms of the contract. It was not intended to enable the common council to be a respecter of persons and to give the contract to favorites, but to give them a discretion to choose between different proposals, relieving the authorities from the necessity of awarding the contract to the lowest bidder irrespective of the terms of the contract, the security offered, or the fairness or sufficiency of the compensation to insure performance with reasonable certainty. This statutory provision does not change the character of the work or import into the contract any unusual terms, or destroy its assignability. The assignment of the contract and the interest of the contractor under it did not terminate the agreement or authorize its rescission or abandonment by the city.

All concur.

Judgment accordingly.

THE BRITISH WAGON COMPANY AND THE PARK-GATE WAGON COMPANY v. LEA & CO.

IN THE QUEEN'S BENCH, JANUARY 13, 1880.

[*Reported in Law Reports, 5 Queen's Bench Division 149.*]

SPECIAL CASE, the material part of which is stated in the judgment of the Court.

A. Wills, Q.C. (Forbes and Lofthouse, with him), for the plaintiffs.

A. L. Smith (A. Kingdon, with him), for the defendants.

The judgment of the Court (Cockburn, C.J., and Manisty, J.) was delivered by

COCKBURN, C.J. This was an action brought by the plaintiffs to recover rent for the hire of certain railway wagons, alleged to be payable by the defendants to the plaintiffs, or one of them, under the following circumstances :

By an agreement in writing of February 10th, 1874, the Parkgate Wagon Company let to the defendants, who are coal merchants, fifty railway wagons for a term of seven years, at a yearly rent of £600 a year, payable by equal quarterly payments. By a second agreement of June 13th, 1874, the company in like manner let to the defendants fifty other wagons, at a yearly rent of £625, payable quarterly like the former.

Each of these agreements contained the following clause : " The owners, their executors, or administrators, will at all times during the said term, except as herein provided, keep the said wagons in good and substantial repair and working order, and, on receiving notice from the tenant of any want of repairs, and the number or numbers of the wagons requiring to be repaired, and the place or places where it or they then is or are, will, with all reasonable despatch, cause the same to be repaired and put into good working order."

On October 24th, 1874, the Parkgate Company passed a resolution, under the 129th section of the Companies Act, 1862, for the voluntary winding up of the company. Liquidators were appointed, and by an order of the Chancery Division of the High Court of Justice, it was ordered that the winding-up of the company should be continued under the supervision of the Court.

By an indenture of April 1st, 1878, the Parkgate Company assigned and transferred, and the liquidators confirmed to the British Company and their assigns, among other things, all sums of money, whether payable by way of rent, hire, interest,

penalty, or damage, then due, or thereafter to become due, to the Parkgate Company, by virtue of the two contracts with the defendants, together with the benefit of the two contracts, and all the interest of the Parkgate Company and the said liquidators therein ; the British Company, on the other hand covenanting with the Parkgate Company " to observe and perform such of the stipulations, conditions, provisions, and agreements contained in the said contracts as, according to the terms thereof were stipulated to be observed and performed by the Parkgate Company." On the execution of this assignment the British Company took over from the Parkgate Company the repairing stations, which had previously been used by the Parkgate Company for the repair of the wagons let to the defendants, and also the staff of workmen employed by the latter company in executing such repairs. It was expressly found that the British Company have ever since been ready and willing to execute, and have, with all due diligence, executed all necessary repairs to the said wagons. This, however, they have done under a special agreement come to between the parties since the present dispute has arisen, without prejudice to their respective rights.

In this state of things the defendants asserted their right to treat the contract as at an end, on the ground that the Parkgate Company had incapacitated themselves from performing the contract, first, by going into voluntary liquidation ; secondly, by assigning the contracts, and giving up the repairing stations to the British Company, between whom and the defendants there was no privity of contract, and whose services, in substitution for those to be performed by the Parkgate Company under the contract, they the defendants were not bound to accept. The Parkgate Company not acquiescing in this view, it was agreed that the facts should be stated in a special case for the opinion of this Court, the use of the wagons by the defendants being in the mean while continued at a rate agreed on between the parties, without prejudice to either, with reference to their respective rights.

The first ground taken by the defendants is in our opinion altogether untenable in the present state of things, whatever it may be when the affairs of the company shall have been wound up, and the company itself shall have been dissolved under the 111th section of the Act. Pending the winding-up, the company is by the effect of §§ 95 and 131 kept alive, the liquidator having power to carry on the business, " so far as may be necessary for the beneficial winding-up of the company," which the continued letting of these wagons, and the receipt of the rent payable in respect of them, would, we presume, be.

What would be the position of the parties on the dissolution of the company it is unnecessary for the present purpose to consider.

The main contention on the part of the defendants, however, was that, as the Parkgate Company had, by assigning the contracts, and by making over their repairing stations to the British Company, incapacitated themselves to fulfil their obligation to keep the wagons in repair, that company had no right, as between themselves and the defendants, to substitute a third party to do the work they had engaged to perform, nor were the defendants bound to accept the party so substituted as the one to whom they were to look for performance of the contract; the contract was therefore at an end.

The authority principally relied on in support of this contention was the case of *Robson v. Drummond*,¹ approved of by this Court in *Humble v. Hunter*.² In *Robson v. Drummond*³ a carriage having been hired by the defendant of one Sharp, a coachmaker, for five years, at a yearly rent, payable in advance each year, the carriage to be kept in repair and painted once a year by the maker—Robson being then a partner in the business, but unknown to the defendant—on Sharp retiring from the business after three years had expired, and making over all interest in the business and property in the goods to Robson, it was held, that the defendant could not be sued on the contract—by Lord Tenterden on the ground that “the defendant might have been induced to enter into the contract by reason of the personal confidence which he reposed in Sharp, and therefore might have agreed to pay money in advance, for which reason the defendant had a right to object to its being performed by any other person;” and by Littledale and Parke, JJ., on the additional ground that the defendant had a right to the personal services of Sharp, and to the benefit of his judgment and taste, to the end of the contract.

In like manner, where goods are ordered of a particular manufacturer, another, who has succeeded to his business, cannot execute the order, so as to bind the customer, who has not been made aware of the transfer of the business, to accept the goods. The latter is entitled to refuse to deal with any other than the manufacturer whose goods he intended to buy. For this *Boulton v. Jones*⁴ is a sufficient authority. The case of *Robson v. Drummond*⁵ comes nearer to the present case, but is, we think, distinguishable from it. We entirely concur in the principle on which the decision in *Robson v. Drummond*⁶ rests,

¹ 2 B. & Ad. 303.

³ 2 B. & Ad. 303.

⁵ 2 B. & Ad. 303.

² 12 Q. B. 310.

⁴ 2 H. & N. 564.

⁶ *Ibid.*

namely, that where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency, or other personal qualification, the inability or unwillingness of the party so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger to the original contract of the performance of it by the other party, and entitles the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is in such a case of the essence of the contract, which, consequently, cannot in its absence be enforced against an unwilling party. But this principle appears to us inapplicable in the present instance, inasmuch as we cannot suppose that in stipulating for the repair of these wagons by the company—a rough description of work which ordinary workmen conversant with the business would be perfectly able to execute—the defendants attached any importance to whether the repairs were done by the company, or by any one with whom the company might enter into a subsidiary contract to do the work. All that the hirers, the defendants, cared for in this stipulation was that the wagons should be kept in repair; it was indifferent to them by whom the repairs should be done. Thus if, without going into liquidation, or assigning these contracts, the company had entered into a contract with any competent party to do the repairs, and so had procured them to be done, we cannot think that this would have been a departure from the terms of the contract to keep the wagons in repair. While fully acquiescing in the general principle just referred to, we must take care not to push it beyond reasonable limits. And we cannot but think that, in applying the principle, the Court of Queen's Bench in *Robson v. Drummond*¹ went to the utmost length to which it can be carried, as it is difficult to see how in repairing a carriage when necessary, or painting it once a year, preference would be given to one coachmaker over another. Much work is contracted for, which it is known can only be executed by means of subcontracts; much is contracted for as to which it is indifferent to the party for whom it is to be done, whether it is done by the immediate party to the contract, or by some one on his behalf. In all these cases the maxim *Qui facit per alium facit per se* applies.

In the view we take of the case, therefore, the repair of the wagons, undertaken and done by the British Company under

¹ 2 B. & Ad. 303.

their contract with the Parkgate Company, is a sufficient performance by the latter of their engagement to repair under their contract with the defendants. Consequently, so long as the Parkgate Company continues to exist, and, through the British Company, continues to fulfil its obligation to keep the wagons in repair, the defendants cannot, in our opinion, be heard to say that the former company is not entitled to the performance of the contract by them, on the ground that the company have incapacitated themselves from performing their obligations under it, or that, by transferring the performance thereof to others, they have absolved the defendants from further performance on their part.

That a debt accruing due under a contract can, since the passing of the Judicature Acts, be assigned at law as well as equity, cannot since the decision in *Brice v. Bannister*¹ be disputed.

We are therefore of opinion that our judgment must be for the plaintiffs for the amount claimed.

ARKANSAS VALLEY SMELTING COMPANY v. BELDEN MINING COMPANY.

IN THE SUPREME COURT OF THE UNITED STATES, MAY 14, 1888.

[*Reported in 127 United States Reports 379.*]

THIS was an action brought by a smelting company, incorporated by the laws of Missouri, against a mining company, incorporated by the laws of Maine, and both doing business in Colorado by virtue of a compliance with its laws, to recover damages for the breach of a contract to deliver ore, made by the defendant with Billing & Eilers, and assigned to the plaintiff. The material allegations of the complaint were as follows :

On July 12th, 1881, a contract in writing was made between the defendant of the first part and Billing & Eilers of the second part, by which it was agreed that the defendants should sell and deliver to Billing & Eilers at their smelting works in Leadville ten thousand tons of carbonate lead ore from its mines at Red Cliff, at the rate of at least fifty tons a day, beginning upon the completion of a railroad from Leadville to Red Cliff, and continuing until the whole should have been delivered, and that "all ore so delivered shall at once upon the delivery thereof

¹ 3 Q. B. D. 569.

become the property of the second party ;" and it was further agreed as follows :

" The value of said ore and the price to be paid therefor shall be fixed in lots of about one hundred tons each ; that is to say, as soon as such a lot of ore shall have been delivered to said second party, it shall be sampled at the works of said second party, and the sample assayed by either or both of the parties hereto, and the value of such lots of ore shall be fixed by such assay ; in case the parties hereto cannot agree as to such assay, they shall agree upon some third disinterested and competent party, whose assay shall be final. The price to be paid by said second party for such lot of ore shall be fixed on the basis hereinafter agreed upon by the closing New York quotations for silver and common lead, on the day of the delivery of sample bottle, and so on until all of said ore shall have been delivered.

" Said second party shall pay said first party at said Leadville for each such lot of ore at once, upon the determination of its assay value, at the following prices," specifying, by reference to the New York quotations, the price to be paid per pound for the lead contained in the ore, and the price to be paid for the silver contained in each ton of ore, varying according to the proportions of silica and of iron in the ore.

The complaint further alleged that the railroad was completed on November 30th, 1881, and thereupon the defendant, under and in compliance with the contract, began to deliver ore to Billing & Eilers at their smelting works, and delivered 167 tons between that date and January 1st, 1882, when " the said firm of Billing & Eilers was dissolved, and the said contract and the business of said firm, and the smelting works at which said ores were to be delivered, were sold, assigned, and transferred to G. Billing, whereof the defendant had due notice ;" that after such transfer and assignment the defendant continued to deliver ore under the contract, and between January 1st and April 21st, 1882, delivered to Billing at said smelting works 894 tons ; that on May 1st, 1882, the contract, together with the smelting works, was sold and conveyed by Billing to the plaintiff, whereof the defendant had due notice ; that the defendant then ceased to deliver ore under the contract, and afterward refused to perform the contract, and gave notice to the plaintiff that it considered the contract cancelled and annulled ; that all the ore so delivered under the contract was paid for according to its terms ; that " the plaintiff and its said assignors were at all times during their respective ownerships ready, able, and willing to pay on the like terms for each lot as

delivered, when and as the defendant should deliver the same, according to the terms of said contract, and the time of payment was fixed on the day of delivery of the 'sample bottle,' by which expression was, by the custom of the trade, intended the completion of the assay or test by which the value of the ore was definitely fixed ;" and that "the said Billing & Eilers, and the said G. Billing, their successor and assignee, at all times since the delivery of said contract, and during the respective periods when it was held by them respectively, were able, ready, and willing to and did comply with and perform all the terms of the same, so far as they were by said contract required ; and the said plaintiff has been at all times able, ready, and willing to perform and comply with the terms thereof, and has from time to time, since the said contract was assigned to it, so notified the defendant."

The defendant demurred to the complaint for various reasons, one of which was that the contract therein set forth could not be assigned, but was personal in its nature, and could not, by the pretended assignment thereof to the plaintiff, vest the plaintiff with any power to sue the defendant for the alleged breach of contract.

The Circuit Court sustained the demurrer, and gave judgment for the defendant ; and the plaintiff sued out this writ of error.

R. S. Morrison, T. M. Patterson and C. S. Thomas, for plaintiff in error.

No appearance for defendant in error.

GRAY, J., after stating the case as above reported, delivered the opinion of the Court.

If the assignment to the plaintiff of the contract sued on was valid, the plaintiff is the real party in interest, and as such entitled, under the practice in Colorado, to maintain this action in its own name. Rev. Stat., § 914 ; Colorado Code of Civil Procedure, § 3 ; *Albany & Rensselaer Co. v. Lundberg*, 121 U. S. 451. The vital question in the case, therefore, is whether the contract between the defendant and Billing & Eilers was assignable by the latter, under the circumstances stated in the complaint.

At the present day, no doubt, an agreement to pay money, or to deliver goods, may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterward done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable.

But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, "You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract." *Humble v. Hunter*, 12 Q. B. 310, 317; *Winchester v. Howard*, 97 Mass. 303, 305; *Boston Ice Co. v. Potter*, 123 Mass. 28; *King v. Batterson*, 13 R. I. 117, 120; *Lansden v. McCarthy*, 45 Missouri, 106. The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise. "Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided." *Pollock on Contracts* (4th ed.) 425.

The contract here sued on was one by which the defendant agreed to deliver ten thousand tons of lead ore from its mines to Billing & Eilers at their smelting works. The ore was to be delivered at the rate of fifty tons a day, and it was expressly agreed that it should become the property of Billing & Eilers as soon as delivered. The price was not fixed by the contract, or payable upon the delivery of the ore. But, as often as a hundred tons of ore had been delivered, the ore was to be assayed by the parties or one of them, and, if they could not agree, by an umpire; and it was only after all this had been done, and according to the result of the assay, and the proportions of lead, silver, silica, and iron, thereby proved to be in the ore, that the price was to be ascertained and paid. During the time that must elapse between the delivery of the ore and the ascertainment and payment of the price, the defendant had no security for its payment, except in the character and solvency of Billing & Eilers. The defendant, therefore, could not be compelled to accept the liability of any other person or corporation as a substitute for the liability of those with whom it had contracted.

The fact that upon the dissolution of the firm of Billing & Eilers, and the transfer by Eilers to Billing of this contract, together with the smelting works and business of the partnership, the defendant continued to deliver ore to Billing according to the contract, did not oblige the defendant to deliver ore to a stranger, to whom Billing had undertaken, without the defendant's consent, to assign the contract. The change in a partnership by the coming in or the withdrawal of a partner might perhaps be held to be within the contemplation of the

parties originally contracting ; but, however that may be, an assent to such a change in the one party cannot estop the other to deny the validity of a subsequent assignment of the whole contract to a stranger. The technical rule of law, recognized in *Murray v. Harway*, 56 N. Y. 337, cited for the plaintiff, by which a lessee's express covenant not to assign has been held to be wholly determined by one assignment with the lessor's consent, has no application to this case.

The cause of action set forth in the complaint is not for any failure to deliver ore to Billing before his assignment to the plaintiff (which might perhaps be an assignable chose in action), but it is for a refusal to deliver ore to the plaintiff since this assignment. Performance and readiness to perform by the plaintiff and its assignors, during the periods for which they respectively held the contract, is all that is alleged ; there is no allegation that Billing is ready to pay for any ore delivered to the plaintiff. In short, the plaintiff undertakes to step into the shoes of Billing, and to substitute its liability for his. The defendant had a perfect right to decline to assent to this, and to refuse to recognize a party, with whom it had never contracted, as entitled to demand further deliveries of ore.

The cases cited in the careful brief of the plaintiff's counsel, as tending to support this action, are distinguishable from the case at bar, and the principal ones may be classified as follows :

First. Cases of agreements to sell and deliver goods for a fixed price, payable in cash on delivery, in which the owner would receive the price at the time of parting with his property, nothing further would remain to be done by the purchaser, and the rights of the seller could not be affected by the question whether the price was paid by the person with whom he originally contracted or by an assignee. *Sears v. Conover*, 3 Keyes, 113, and 4 Abbott (N. Y. App.) 179 ; *Tyler v. Barrows*, 6 Robertson (N. Y.) 104.

Second. Cases upon the question how far executors succeed to rights and liabilities under a contract of their testator. *Hambly v. Trott*, Cowper, 371, 375 ; *Wentworth v. Cock*, 10 Ad. & El. 42, and 2 Per. & Dav. 251 ; *Williams on Executors* (7th ed.), 1723-25. Assignment by operation of law, as in the case of an executor, is quite different from assignment by act of the party ; and the one might be held to have been in the contemplation of the parties to this contract although the other was not. A lease, for instance, even if containing an express covenant against assignment by the lessee, passes to his executor. And it is by no means clear that an executor would be bound to perform, or would be entitled to the benefit of, such

a contract as that now in question. *Dickinson v. Calahan*, 19 Penn. St. 227.

Third. Cases of assignments by contractors for public works, in which the contracts, and the statutes under which they were made, were held to permit all persons to bid for the contracts, and to execute them through third persons. *Taylor v. Palmer*, 31 California, 240, 247 ; *St. Louis v. Clemens*, 42 Missouri, 69 ; *Philadelphia v. Lockhardt*, 73 Penn. St. 211 ; *Devlin v. New York*, 63 N. Y. 8.

Fourth. Other cases of contracts assigned by the party who was to do certain work, not by the party who was to pay for it, and in which the question was whether the work was of such a nature that it was intended to be performed by the original contractor only. *Robson v. Drummond*, 2 B. & Ad. 303 ; *British Wagon Co. v. Lea*, 5 Q. B. D. 149 ; *Parsons v. Woodward*, 2 Zabriskie, 196.

Without considering whether all the cases cited were well decided, it is sufficient to say that none of them can control the decision of the present case.

Judgment affirmed.

O'KEEFE v. ALLEN.

IN THE SUPREME COURT OF RHODE ISLAND, MARCH 11, 1898.

[*Reported in 39 Atlantic Reporter 752.*]

EXCEPTIONS from district court, Providence County.

Action by John A. O'Keefe against William Allen. An order denying a motion to discharge the garnishee, and plaintiff excepts. Exceptions sustained.

T. F. Farrell, for plaintiff.

J. M. Gilbrain, for defendant.

MATTESON, C.J. This is *assumpsit* on book account. The action was brought in the district court for the Sixth Judicial District. Attachments by trustee process were made of the defendant's wages in the possession of the Miller Iron Works, by which he was employed. The answer of the garnishee disclosed that on June 24th, 1895, the defendant, by his deed of that date, assigned to James Cunningham all moneys which should become due to him from the garnishee for services as a moulder between that date and June 24th, 1896 ; that at the date of the assignment he was in the employment of the garnishee, and had been so employed for a number of years, but that he left the garnishee's employment in October, 1895, and entered their

employment again in the month of December following. On these facts the plaintiff moved that the garnishee be discharged. The court denied the motion, and the plaintiff excepted. We think that the district court erred in its rulings. It is well established that wages to be earned under a subsisting contract may be assigned, and that an assignment in good faith is valid against a subsequent garnishment. *Tiernay v. McGarity*, 14 R. I. 231. The moment, however, that the defendant left the employment of the Miller Iron Company, in October, 1895, the contract of employment, on which the assignment of wages to the employment was not by virtue of the old, but under a new, hiring. As to this new contract, the assignment at law, however it might be in equity, was the assignment of a mere possibility, and, therefore, at law, inoperative. *Tiernay v. McGarity*, 14 R. I. 232; *Edwards v. Peterson*, 80 Me. 367, 14 Atl. 936. The case which comes nearest to sustaining an opposite doctrine of any which we have found is *Wallace v. Chair Co.*, 16 Gray, 209. In this case it was held that a written order for the payment of a certain sum out of his wages, drawn for a sufficient consideration, by a workman employed under a subsisting engagement for a certain time, upon his employer, and accepted by the latter, and made "payable when earned," applied to wages earned under a new engagement, entered into by the workman immediately on the expiration of the first, for lower wages, with the same employer. The court admitted the rule stated above, but seemed to think that the fact that the new arrangement immediately followed the old, so that the service was continuous, was sufficient to prevent the operation of the rule. It evidently regarded the new arrangement rather as a modification of the old, and the old as still subsisting, than as a new and independent employment. The case at bar is in this respect totally unlike *Wallace v. Chair Co.*, for here there was no continuity of service, and the return to the employment was, so far as appears, under a new and distinct hiring.

The answer of the garnishee also disclosed that before the service of the writ of mesne process, the defendant, on June 24th, 1896, had executed a second assignment of his wages to Cunningham, which was operative, under the new hiring in the preceding December, as against the service by trustee process on that writ on July 3d, 1896.

Exception sustained, and case remitted to the district court for the Sixth Judicial District, with direction to charge the garnishee to the extent of the moneys in its possession at the time of the attachment on the original writ, to wit, June 20th, 1895.

SAMUEL PALMER *v.* STEPHEN MERRILL.JAMES DANA *v.* SAME.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER TERM, 1850.

[*Reported in 6 Cushing 282.*]

THESE were actions of *assumpsit* against the defendant as the administrator of Asa Spaulding, late of Charlestown, deceased, and were tried before Metcalf, J., in this Court.

The writ in the first-named case, which was dated March 26th, 1849, contained the common counts, accompanied by a specification of claim, set forth at length in a special declaration, which was afterward filed in the cause. In the special declaration the plaintiff alleged that, on May 26th, 1847, the Massachusetts Hospital Life Insurance Company caused the life of the defendant's intestate to be insured, for the term of seven years from that day, in the sum of \$1000, payable to the assured, his executors, administrators, or assigns; that the assured, on May 26th, 1848, by a memorandum in writing endorsed on the policy for a valuable consideration, assigned and requested the insurers to pay the plaintiff the sum of \$400, part of the sum insured by the policy, in case of loss on the same, of which assignment and request the insurers on the same day had due notice; that on August 5th, 1848, the assured died at Charlestown, and on the 9th due notice and proof thereof were given to the insurers; that the defendant was duly appointed administrator of the estate of the assured, and was notified of the assignment and request; that on November 8th, 1848, the insurers paid the defendant the sum of \$1000, the amount insured on Spaulding's life; and that on the same day the plaintiff demanded of the defendant the sum of \$400 above mentioned, by means of which the defendant became liable, and in consideration thereof promised the plaintiff to pay him the last-mentioned sum on demand, but though often requested refused so to do.

At the trial the plaintiff gave evidence of the facts alleged in his declaration, and also that at the time of the endorsement on the policy of the assignment or request above mentioned the defendant's intestate was indebted to the plaintiff and one Harding, as partners, for the amount due on three promissory notes, being about the sum of \$300; that on said May 26th, 1848,

when the annual premium was paid, the assured exhibited the policy to the insurers with the assignment or request above mentioned endorsed thereon ; that the plaintiff, soon after the death of the assured, demanded of the insurers to pay him the said sum of \$400, which they declined doing, on the ground that the assignment thereof was not in the form usually required by them, and that they did not consider themselves bound to pay the amount insured by the policy by instalments ; and that the policy with the assignment thereof endorsed, together with other effects of the assured, came into the hands of the defendant as administrator immediately after his appointment as such.

The defendant pleaded in abatement that the estate of his intestate had been represented insolvent before the date of the plaintiff's writ, to which plea the plaintiff demurred and the defendant was ordered to answer over. The defendant then pleaded farther in abatement, that the action was commenced before the expiration of one year from the time of his taking out administration, which plea the defendant afterward waived by agreement with the plaintiff.

At the trial the defendant pleaded the general issue, and specified in his defence : First, that whatever money was paid to him by the insurers was paid to him as administrator, and that the same was lawfully retained by him as such, and belonged to the general assets of the estate of his intestate, which had been duly rendered insolvent ; and, second, that the defendant was not liable for interest.

It was admitted by the plaintiff that the estate of the assured had been duly rendered insolvent.

The jury, under the instructions of the presiding judge, returned a verdict for the plaintiff for the amount due on the notes in evidence with interest.

In the second entitled cause the writ bore date the same day, contained a similar declaration, the same facts were admitted and proved under it, and the same proceedings took place as in the preceding case.

The verdicts in both cases were taken subject to the opinion of the whole Court on the question, whether the several plaintiffs were entitled to judgment in the usual form, and to execution thereon, and to full satisfaction thereof if the assets of the defendant's intestate were sufficient to satisfy the same ; or whether the judgments, when rendered, were to be presented to the commissioners in insolvency appointed to examine the claims against the estate, and to be allowed and paid like the claims of other creditors ; and also upon the further question,

whether the demand was in its nature assignable, and whether the plaintiffs' remedy was by the present form of action or by a bill in equity.

C. G. Loring for the plaintiffs.

1. These demands were assignable. The plaintiffs do not contend that the policy could be assigned in portions, but that an equitable interest in a portion might be assigned. These assignments of parts constituted a trust; the administrator alone must collect the whole, but when collected he holds the portions which have been assigned in trust for the assignees. 2 Story, Eq. J., §§ 1040*b*, 1044; Lewin on Trusts, 15, 7677; Safford *v.* Rantoul, 12 Pick. 233; Wakefield *v.* Martin, 3 Mass. 558; Cutts *v.* Perkins, 12 Mass. 206; Parkhurst *v.* Dickerson, 21 Pick. 307; Adams *v.* Robinson, 1 Pick. 461. The delivery was as perfect as the case admitted.

2. The plaintiffs can maintain *assumpsit*, and are not obliged to resort to a bill in equity. Arms *v.* Ashley, 4 Pick. 71; Newhall *v.* Wheeler, 7 Mass. 189, 198; Hall *v.* Marston, 17 Mass. 575; Claflin *v.* Godfrey, 21 Pick. 1, 6; Swasey *v.* Little, 7 Pick. 296; Sheldon *v.* Purple, 15 Pick. 528; Andrews *v.* Sparhawk, 13 Pick. 393.

3. The plaintiffs may recover judgment and execution in these actions for the full amount of their claims, and are not obliged to present their claims to the commissioners in insolvency. See Rev. Sts. ch. 69, §§ 6, 8; Lewin on Trusts, 205; Johnson *v.* Ames, 11 Pick. 173; Safford *v.* Rantoul, 12 Pick. 233; Trecothick *v.* Austin, 4 Mason, 16, 29-30.

G. W. Warren for the defendant.

SHAW, C.J. This is a suit against the defendant as administrator of the estate of Asa Spaulding, in which the plaintiff seeks to recover the whole amount due to him on certain notes due from said Asa Spaulding. It is conceded that the estate of Spaulding has been represented insolvent, and it is therefore quite clear that the plaintiff cannot recover his full debt, to the injury of other creditors, unless there are circumstances which distinguish this case from the ordinary case of a claim on an insolvent estate. The plaintiff undertakes thus to distinguish it, by showing that he had a lien on a specific portion of the assets, which came into the hands of the defendant charged with such lien; and that the defendant, having received the amount of it, is liable to the plaintiff as for money received to his use.

The ground is that Asa Spaulding obtained a policy of insurance on his own life for \$1000; that during his life, and while the policy was in force, he endorsed an order thereon, addressed

to the insurers requesting them, in case of loss, to pay \$400 of the amount thereby insured to Palmer, the plaintiff, which order was duly signed by Spaulding and notified to the insurers, but the policy with this endorsement thereon remained in the custody of Spaulding until his decease, and came into the hands of the administrator with the other effects of the deceased. A like order in all respects, and for the like sum, was also endorsed on the policy in favor of James Dana. The claim of the plaintiff is, that this was an assignment *pro tanto* of the policy, as collateral security for several notes, described in the report. After the decease of Spaulding, and notice to the insurers, the plaintiff demanded of them the \$400, part of the loss which the insurers declined paying, on the ground that the assignment was not in the form usually required by them, and, besides, that they did not think themselves obligated to pay the amount of the policy in instalments. Subsequently on the demand of the defendant, as administrator, the insurers paid the full amount to him.

The question is whether the case shows an assignment which vested any interest in this policy, legal or equitable, in the plaintiff. The policy was an executory contract, a chose in action, available as a legal contract only to Asa Spaulding and his personal representatives.

According to the modern decisions, courts of law recognize the assignment of a chose in action, so far as to vest an equitable interest in the assignee, and authorize him to bring an action in the name of the assignor and recover a judgment for his own benefit. But in order to constitute such an assignment, two things must concur: First, the party holding the chose in action must, by some significant act, express his intention that the assignee shall have the debt or right in question, and, according to the nature and circumstances of the case, deliver to the assignee, or to some person for his use, the security if there be one, bond, deed, note, or written agreement, upon which the debt or chose in action arises; and, secondly, the transfer shall be of the whole and entire debt or obligation, in which the chose in action consists, and, as far as practicable, place the assignee in the condition of the assignor, so as to enable the assignee to recover the full debt due, and to give a good and valid discharge to the party liable.

The transfer of a chose in action bears an analogy in some respect to the transfer of personal property; there can be no actual manual tradition of a chose in action, as there must be of personal property to constitute a lien, but there must be that which is similar, a delivery of the note, certificate, or other

document, if there is any, which constitutes the chose in action, to the assignee, with full power to exercise every species of dominion over it, and a renunciation of any power over it on the part of the assignor. The intention is, as far as the nature of the case will admit, to substitute the assignee in place of the assignor as owner.

It appears to us that the order endorsed on this policy, and retained by the assured, fails of amounting to an assignment in both of these particulars. We do not question that an assignment may be made of an entire fund in the form of an order drawn by the owner on the holder of the fund or party indebted, with authority to receive the property or discharge the debt. But if it be for a part only of the fund or debt, it is a draft or bill of exchange which does not bind the drawee or transfer any proprietary or equitable interest in the fund until accepted by the drawee. It therefore creates no lien upon the fund. Upon this point the authorities seem decisive. *Welch v. Mandeville*, 1 Wheat. 233 ; *S. C.* 5 Wheat. 277 ; *Robbins v. Bacon*, 3 Greenl. 346 ; *Gibson v. Cooke*, 20 Pick. 15.

It seems to us quite clear that the plaintiff acquired no such interest in this policy as would enable him to maintain an action against the insurers. He seems himself to have thought so too, for although he demanded the amount of them, which they refused to pay, for reasons which seem to be conclusive, he yet declined bringing any suit against them, but permitted them to pay the money over to the administrator. If the plaintiff had no such legal or equitable interest in the debt due on the policy as would enable him to maintain an action or suit in equity, either in his own name or in the name of the administrator of the assignor, for his own benefit, it seems difficult to perceive on what ground he had any equitable lien on the debt due by the policy, and if he had not, then the administrator took it as general assets charged with no trust for the plaintiff.

It appears to us that a contrary doctrine would tend to a great confusion of rights. A man cannot by his own act charge a personal chattel, a carriage and horses, for instance, with a lien in favor of a particular creditor, and yet retain the dominion and possession of them till his death ; *à fortiori* where he retains the memorandum or instrument of transfer of such chattel in his own possession and under his own control. It seems to us equally impracticable to charge a debt due to him, by an order or memorandum retained in his own possession, purporting to give a particular creditor an equitable lien by the assignment of such chose in action, without a transfer or delivery of the security by which it is manifested. Such an

assignment would not constitute the debtor himself a trustee to the creditors. What trust then devolves on the administrator? Were the law otherwise, an administrator, instead of succeeding to the property and rights of his intestate, to be administered and distributed equally among all the creditors, might be obliged to dispose of it in very unequal proportions according to such supposed declaration of trust. These considerations apply with peculiar force to a policy of insurance on the life of the assured himself on which no money can become due until the death of the assured, at which time all his rights devolve on his personal representative. If, therefore, it is intended to supersede the right of the personal representative, it must be done in the mode required for a complete assignment of the whole contract.

The defendant having waived his objection that this action was brought too soon for the purpose of trying the plaintiff's right, we see no objection to entering a judgment for the amount of the debt actually due from the intestate, to be certified to the judge of probate, to be added to the commissioners' report of debts allowed, so as to enable the plaintiff to take a dividend *pro rata* with other creditors, but not to have execution *de bonis testatoris*.

NOTE.—It having been suggested in the argument that other facts existed not appearing in the report, showing that the assignments had been delivered to the respective assignees at the time, notice thereof given to the company, and assented to by them, expressly or by implication, a new trial was granted, on which the plaintiffs obtained verdicts and judgments.

ADDISON BRILL ET AL., APPELLANTS, *v.* JEROME
TUTTLE, RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, SEPTEMBER 21,
1880.

[*Reported in 81 New York Reports 454.*]

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, reversing a judgment in favor of plaintiffs entered upon a verdict. (Reported below, 15 Hun, 289.)

This action was brought upon a written instrument, a copy of which is set forth in the opinion, wherein also the material facts are stated.

Thomas Richardson for appellants.

Amos H. Prescott for respondent.

RAPALLO, J. The difficulty in this case consists rather in ascertaining the true construction to be put upon the order than the legal principles applicable to the case. There can be no doubt as to the rule that when, for a valuable consideration from the payee, an order is drawn upon a third party and made payable out of a particular fund, then due or to become due from him to the drawer, the delivery of the order to the payee operates as an assignment *pro tanto* of the fund, and the drawee is bound, after notice of such assignment, to apply the fund, as it accrues, to the payment of the order and to no other purpose, and the payee may, by action, compel such application. It is equally well established that if a draft be drawn generally upon the drawee, to be paid by him in the first instance, on the credit of the drawer and without regard to the source from which the money used for its payment is obtained, the designation by the drawer of a particular fund, out of which the drawee is to subsequently reimburse himself for such payment, or a particular account to which it is to be charged, will not convert the draft into an assignment of the fund, and the payee of the draft can have no action thereon against the drawee unless he duly accepts. In all cases, therefore, in which a particular fund, to accrue *in futuro* is designated in the draft, and the language is ambiguous, the turning-point is whether it was the intention of the parties that the payment should be made only out of the designated fund, when or as it should accrue, or whether the direction to the drawee to pay was intended to be absolute, and the fund was mentioned only as a source of reimbursement or an instruction as to book-keeping.

The order in this case was in the following words :

“ MOHAWK, August 31, 1876.

“ JEROME TUTTLE :

“ Pay Brill & Russell \$300, and charge the same to our account for labor and materials performed and furnished in the repairs and alterations of the house in which you reside in the village of Mohawk.

J. P. ACKERMAN & SON.”

If at the time this order was drawn the drawers had to their credit on the designated account the sum of \$300 or more, and this fact was understood by the parties, there would be no difficulty in holding that the intention was to transfer that credit or balance *pro tanto* to the plaintiffs, by substituting them in the place of the drawers as the recipients thereof. It would be fair to presume in that case that it was intended that the pay-

ment should be made out of the balance of account in the hands of the drawee, and not on the general credit of the drawer and that the direction to charge the payment to that account was an appropriation of such balance to the extent necessary to meet the order. The complaint alleges, and when the plaintiff rested the allegation was sustained by proof, that when the order was drawn, August 31st, and when it was presented, September 1st, there was a sufficient amount due and admitted to be due from the drawee on the account mentioned in the order to pay it. The motion for a nonsuit was therefore properly denied.

The evidence as to the amount due on the account, and as to the admission of the defendant, was, however, controverted by evidence on his behalf, and that question was submitted to the jury with the instruction that the plaintiffs were entitled to recover any moneys owing by the defendant to the drawers on September 1st, 1876, the day of the presentation of the order to him, and at any time thereafter before the commencement of this suit, on the account mentioned in the order, which were not otherwise appropriated on September 1st, and under this charge the jury found for the plaintiff the sum of \$243.

This instruction brings up the question whether, assuming that the fund to meet the order had not accrued and become payable when it was drawn and presented, the intention was that the payment should be made out of the fund when it should accrue, and that such payment should be charged, when made, against the sums thus becoming due, or whether it was intended as a direction to the drawee to advance the amount of the order without regard to the state of the account, and charge the amount thus advanced to the drawers, and subsequently reimburse himself out of the sums to become due from him to the drawers on the specified account.

Considerable evidence was given of the circumstances surrounding the transaction, and of the negotiations between the parties preceding the giving of the order, and it may be that a mixed question of law and fact was presented which would have justified the Court, if requested, in submitting the question of the intentions and understanding of the parties to the jury. But no such request was made, and both parties requested the Court to construe the order, and, therefore, if any question of fact was involved, it was submitted to the decision of the Court. It was a conceded fact that the drawers had a contract with the defendant for repairing his house, for which they were to receive \$100, and the defendant testified that there was no set time when it was to be paid ; that he expected

it was to be paid when the work was completed, but advanced from time to time on account of labor, etc. The drawers also did extra work to the amount of \$93, and the job was nearly completed at the time the order was drawn. It was also an uncontroverted fact that the drawers owed the plaintiffs \$300, and before drawing the order one of the drawers and one of the plaintiffs went together to the defendant, and the defendant testified that they then asked him to accept an order in favor of plaintiffs for \$300, or give them a note or some security for the money, and that he refused. The testimony is conflicting as to whether the amount then due from the defendant was admitted or discussed. Immediately after this conversation the order in question was drawn and delivered to the plaintiff. It was several times presented to the defendant, but he refused to pay or recognize it. The amount due from defendant to the drawers, at or after the time of the presentation of the order, on the designated account, was severely litigated on the trial, and the verdict establishes that it was \$243. It can hardly be conceived that, under these circumstances, any of the parties could have understood the order as a request to the defendant to advance the \$300, or any part of it, unless it was, or should become, due from him to the drawers on the contract and account for repairs, etc. Its language does not necessarily require such a construction, and, if ambiguous, should be interpreted with reference to the circumstances under which it was given. (73 N. Y. 335.) These are all inconsistent with such a view. The defendant had already absolutely refused to accept an order or give any note or security for the money due plaintiffs, and this was known to all the parties, and it would have been idle to draw a draft upon him for any other purpose than as a direction to pay to the plaintiffs such sums as were or might become due to the drawers on their account for repairs, etc. The direction in the order to charge the money to be paid thereon to that account, indicates, we think, sufficiently in connection with the surrounding circumstances that the payments were to be made out of the moneys due or to become due on the account, and all parties must have so understood it. If such is its true construction, it was an assignment of the fund within all the authorities. It was the plain duty, therefore, of the defendant, after notice of the plaintiffs' rights, to apply the money in the order, and if he afterward paid it over voluntarily to the drawers, he did so in his own wrong.

The case of *Shaver v. The Western Union Telegraph Company*, 57 N. Y. 459, is relied upon as decisive of this case in favor of the respondent. The circumstances of that case were very peculiar.

The order was drawn in pursuance of a previous special arrangement known to the payee, whereby the drawer was authorized to revoke it, and this was a controlling circumstance which deprived it of the character of an absolute assignment. Lott, Com., in delivering the opinion, says: "Notice was thereby given to the party who advanced money on the faith of the order that it was not to be considered an absolute assignment of the sums that should become payable at the end of each month, but that it was subject to the right of Borst (the drawer) to revoke it." "Any and every person taking it took it subject to the exercise of that right." The order was revoked by the drawer, and whatever else may have been said is unimportant, as this was the point upon which the case turned.

Kelly v. Mayor, 4 Hill, 263, is also much relied upon. That was not the case of an order drawn by a creditor upon his debtor in favor of a third party to be charged against the debt, but a negotiable draft drawn by the mayor of the city upon the treasurer, "Pay to A. L. or order \$1500 for award No. 7, and charge to Bedford road assessment." It was proved as a fact that at the date of the draft the treasurer had no funds in his hands arising from the Bedford road assessment, but such funds came to his hands afterward. It was held that the mere direction of the mayor to the treasurer to what account to charge the draft did not indicate any intention to assign or appropriate any particular fund, and did not deprive the instrument of its character of a negotiable bill of exchange.

On the other hand, expressions somewhat similar, used under different circumstances, have been held to constitute such an appropriation. In Lowery v. Steward, 25 N. Y. 239, the language of the order was, "Pay on account of twenty-four bales of cotton shipped you as per bill of lading per steamer Colorado." In this case the prior correspondence between the parties was also taken into consideration. In Parker v. The City of Syracuse, 31 N. Y. 376, a contractor with the city for laying plank sidewalks drew his order on the comptroller, "Pay Parker & Wright \$1420 on plank road and sidewalk accounts, and charge to my account." In Alger v. Scott, 54 N. Y. 14, an order was drawn by a landlord upon his tenant in August, 1866, "Pay to J. R. G. \$346, and charge same to me, account of rent of house, 13 Cheever Place." No rent was due at the time. The tenant accepted the draft, but it was held that this order of acceptance constituted no defence to an action by the landlord for the rent due November, 1866, on the ground that the order was not a bill of exchange, but an equitable assignment of the rent, and as such void for want of consideration from

the payee. In *Ehrichs v. De Mill*, 75 N. Y. 370, the language of the order was, "Pay to E. \$400, and charge the same to my account of grading and paving Lexington Avenue between Patchen and Broadway as per contract." The words "as per contract" are commented upon as indicating that the intention was that the payment should only be made as required by the contract. See also *Munger v. Shannon*, 61 N. Y. 251, and *Risley v. Smith*, 64 N. Y. 576. It is useless to multiply references to authorities, for the question in all this class of cases is the same, and it must be determined according to the circumstances of each case. It is whether the draft is drawn upon the general credit of the drawee or upon a particular fund. When the language is ambiguous, and the order not negotiable, as in the present case, the attendant circumstances may be shown to determine the intention and understanding of the parties. *White's Bank v. Myles*, 73 N. Y. 335.

The order of the General Term should be reversed and the judgment on the verdict affirmed.

All concur ; FINCH, J., not on bench at argument.

Order reversed and judgment affirmed.

WILLIAM CARTER v. JOHN W. NICHOLS.

IN THE SUPREME COURT OF VERMONT, MAY TERM, 1886.

[*Reported in 58 Vermont 553.*]

ASSUMPSIT. Plea, general issue, and notice of payment and settlement. Trial by Court on an agreed statement, September Term, 1885, Powers, J., presiding. Judgment for the defendant. The facts are sufficiently stated in the opinion.

Gordon & Gary for the plaintiff.

S. C. Shurtleff for the defendant.

The opinion of the Court was delivered by

Ross, J. The plaintiff was in the employment of the defendant in 1884 at \$20 per month. April 12th, 1884, he wrote a line to the defendant, requesting him to pay to John Hardigan, or order, the sum of \$10 per month for the next two months, and the sum of \$5 per month thereafter while he should work for the defendant, until a certain judgment against him should be paid. Attached to the writing was an acceptance and an agreement to pay Hardigan these sums as they became due. The order was presented to the defendant with a request that he would sign the acceptance. This he refused to do. The plain-

tiff continued to work for the defendant over three months, and the defendant paid him in full therefor. This suit is brought in the name of the plaintiff for the benefit of Hardigan to recover for the sums named in the order, that would have been due if the defendant had accepted the order. Hardigan contends that the order operated as an assignment of that portion of the wages of the plaintiff thereafter earned, named in the order. It is well settled that an employé in actual service, or under a contract for service, may make a valid assignment of the whole of his future earnings in such service, and that the employer on notice thereof will be bound to pay the assignee. *Thayer v. Kelley*, 28 Vt. 19. In such case the employer is put to no disadvantage. But the employé would have no legal right, without the consent of the employer, to split up his claim for services and recover in separate actions. Neither can he confer such right upon an assignee, by making an assignment or assignments of portions of his earnings under the contract to one or more persons. The employer cannot, without his consent, lawfully be subjected to the inconveniences and complications which might be incurred by such partial assignments. He is under no legal obligation to recognize them, nor to be bound by them, and he may for that reason disregard them. *Mandeville v. Welch*, 5 Wheat. 277; *Fairgrievies v. Lehigh Navigation Co.*, 2 Phil. 182; *Gibson v. Cook*, 20 Pick. 15.

Without considering whether the writing would be a good equitable assignment in other respects, for the reasons already stated, the judgment is affirmed.

SARAH LEGH v. FRANCES LEGH.

IN THE COURT OF COMMON PLEAS, MAY 30, 1799.

[*Reported in 1 Bosanquet & Puller 447.*]

ON a former day Shepherd showed cause against a rule *nisi* obtained by Le Blanc, for setting aside a plea of release in an action on a bond, and ordering the release to be cancelled.

The case as disclosed by the affidavits in support of the rule appeared to be this. Frances Legh having given a bond to Sarah Legh to secure £75, Sarah assigned it to John Legh as a security for the payment of a lesser sum, of which Frances had notice. John having brought an action on the bond against Frances in the name of Sarah, Sarah gave a release to Frances by whom she had been satisfied her debt, and this release was pleaded.

EYRE, C.J. The conduct of this defendant has been against good faith, and the only question is whether the plaintiff must not seek relief in a court of equity. The defendant ought either to have paid the person to whom the bond was assigned, or have waited till an action was commenced against him, and then have applied to the Court. Most clearly it was in breach of good faith to pay the money to the assignor of the bond and take a release, and I rather think the Court ought not to allow the defendant to avail himself of this plea, since a court of equity would order the defendant to pay the plaintiff the amount of his lien on the bond, and probably all the costs of the application.

BULLER, J. There are many cases in which the Court has set aside a release given to prejudice the real plaintiff. All these cases depend on circumstances. If the release be fraudulent, the Court will attend to the application.

The Court recommended the parties to go before the prothonotary in order to ascertain what sum was really due to the plaintiff on the bond.

Shepherd on this day stated that the defendant objected to going before the prothonotary, upon which the Court said that the rule must be made absolute. He then applied for leave to plead payment of the bond, and contended that as this was not an application under the statute to plead several pleas, the Court had no discretion.

EYRE, C.J. The Court has in many cases refused to allow a party to take his legal advantage where it has appeared to be against good faith. Thus we prevent a man from signing judgment who has a right by law to do so if it would be in breach of his own agreement. In order to defeat the real plaintiff, this defendant has colluded with the nominal plaintiff to obtain a release, and I think therefore the plea of release may be set aside consistently with the general rules of the Court. And if so, the defendant cannot be permitted to plead payment of the bond, as that would amount to the same thing.

BULLER, J. The Court proceeds on the ground that the defendant has in effect agreed not to plead payment against the nominal obligee.

Upon this the defendant consented to go before the prothonotary.

LITTLEFIELD v. STOREY.

IN THE SUPREME COURT OF JUDICATURE OF NEW YORK,
AUGUST, 1808.

[*Reported in 3 Johnson's Reports 425.*]

THIS was an action of debt. The declaration contained two counts on two obligations for \$100 each. The defendant pleaded *non est factum*, and that on August 1st, 1806, he paid to the plaintiff the money due on the obligations. The plaintiff replied that before the commencement of the present suit, and before the said August 1st, 1806, he sold and assigned over the said obligations to one Z. R. Shepherd, to have and receive the money due thereon to his own use, and did authorize him, in the name of him, the plaintiff, to demand and receive the same to the use and benefit of him, the said Shepherd, of which the defendant had notice; and the plaintiff averred that this action was commenced for the sole use and benefit of the said Shepherd, for the purpose of enabling him to collect and receive the money due on the obligations.

To this replication there was a general demurrer and joinder. *Weston* in support of the demurrer.

Z. R. Shepherd, contra, was stopped by the Court.

Per CURIAM. This is a clear case. It has been decided that this Court will recognize and protect the rights of an assignee of a chose in action.

In the case of *Andrews v. Beecker* it was held that a release by the obligee of a bond, after an assignment and notice, was a nullity. See also *Legh v. Legh*, 1 Bos. & Pull. 447.

Judgment for the plaintiff.

WELCH v. MANDEVILLE.

IN THE SUPREME COURT OF THE UNITED STATES, FEBRUARY
TERM, 1816.

[*Reported in 1 Wheaton's Reports 233.*]

- ERROR to the Circuit Court for the District of Columbia for Alexandria County. This was an action of covenant brought in the name of Welch (for the use of Prior) against Mandeville and Jamieson. The suit abated as to Jamieson by a return of no inhabitant. The defendant, Mandeville, filed two pleas. The second plea, upon which the question in this Court arises, states, that, on July 5th, 1806, James Welch impleaded Mande-

ville and Jamieson, in the Circuit Court of the District of Columbia, for the county of Alexandria, in an action of covenant, in which suit such proceedings were had, that, afterward, to wit, at a session of the Circuit Court, on December 31st, 1807, "the said James Welch came into Court and acknowledged that he would not farther prosecute his said suit, and from thence altogether withdraw himself." The plea then avers, that the said James Welch, in the plea mentioned, is the same person in whose name the present suit is brought, and that the said Mandeville and Jamieson, in the former suit, are the same persons who are defendants in this suit, and that the cause of action is the same in both suits. To this plea the plaintiff filed a special replication, protesting that the said James Welch did not come into Court and acknowledge that he would not farther prosecute the said suit and from thence altogether withdraw himself; and avers that James Welch, being indebted to Prior, in more than \$8707.09, and Mandeville and Jamieson being indebted, by virtue of the covenant in the declaration mentioned, in \$8707.09, to Welch, he, Welch, on September 7th, 1799, by an equitable assignment, assigned to Prior, for a full and valuable consideration, the said \$8707.09, in discharge of the said debt, of which assignment the replication avers Mandeville and Jamieson had notice. The replication further avers, that the suit in the plea mentioned was brought in the name of Welch, as the nominal plaintiff for the use of Prior, and that the defendant, Mandeville, knew that the said suit was brought, and was depending for the use and benefit of the said Prior; and that the said suit in the plea mentioned, without the authority, consent, or knowledge of the said Prior, or of the attorney prosecuting the said suit, and without any previous application to the court, was "dismissed, agreed." The replication farther avers, that the said James Welch was not authorized by the said Prior to agree or dismiss the said suit in the plea mentioned; and that the said Joseph Mandeville, with whom the supposed agreement for the dismissal of the said suit was made, knew, at the time of making the said supposed agreement, that the said James Welch had no authority from Prior to agree or dismiss said suit. The replication farther avers, that the said agreement and dismissal of the said suit were made and procured by the said Joseph Mandeville, with the intent to injure and defraud the said Prior, and deprive him of the benefit of the said suit in the plea mentioned. The replication also avers, that the said Prior did not know that the said suit was dismissed until after the adjournment of the Court at which it was dismissed; and, farther, that the supposed entry upon the record of the

Court in said suit, that the plaintiff voluntarily came into Court and acknowledged that he would not further prosecute his said suit, and from thence altogether withdraw himself, and the judgment thereupon was made and entered by covin, collusion, and fraud ; and that the said judgment was, and is, fraudulent. To this replication the defendant filed a general demurrer, and the replication was overruled. It appeared by the record of the suit referred to in the plea, that the entry is made in these words : " This suit is dismissed, agreed," and that this entry was made by the clerk without the order of the Court, and that there is no judgment of dismissal rendered by the Court, but only a judgment refusing to reinstate the cause.

Lee for the plaintiff.

Swann for the defendant.

STORY, J., delivered the opinion of the Court.

The question upon these pleadings comes to this, whether a nominal plaintiff, suing for the benefit of his assignee, can, by a dismissal of the suit under a collusive agreement with the defendant, create a valid bar against any subsequent suit for the same cause of action.

Courts of law, following in this respect the rules of equity, now take notice of assignments of choses in action, and exert themselves to afford them every support and protection not inconsistent with the established principles and modes of proceeding which govern tribunals acting according to the course of the common law. They will not, therefore, give effect to a release procured by the defendant under a covenous combination with the assignor in fraud of his assignee, nor permit the assignor injuriously to interfere with the conduct of any suit commenced by his assignee to enforce the rights which passed under the assignment. The dismissal of the former suit, stated in the pleadings in the present case, was certainly not a *retraxit* ; and if it had been, it would not have availed the parties, since it was procured by fraud. Admitting a dismissal of a suit, by agreement, to be a good bar to a subsequent suit (on which we give no opinion), it can be so only when it is *bona fide*, and not for the purpose of defeating the rights of third persons. It would be strange, indeed, if parties could be allowed, under the protection of its forms, to defeat the whole objects and purposes of the law itself.

It is the unanimous opinion of the Court, that the judgment of the Circuit Court, overruling the replication to the second plea of the defendant, is erroneous, and the same is reversed, and the cause remanded for further proceedings.

Judgment reversed.

PARSONS *v.* WOODWARD.

IN THE SUPREME COURT OF NEW JERSEY, JULY TERM, 1849.

[*Reported in 2 Zabriskie 196.*]

THIS is an action of covenant, and the plaintiff declared as follows :

"For that whereas heretofore, to wit, on (January 19th, 1839), at M. H., in the county of B., and within the jurisdiction of this Court, by certain articles of agreement, etc., making profert, it was agreed, by and between the said parties, that the defendant, for four thousand morus multicaulis trees, on the day and year last aforesaid, sold to him by the plaintiff, and by him to be delivered upon the ground where the said trees should grow, in the fall months of the year aforesaid, the trees to be at least three feet high and as much above as they should grow, root, stalk, and branch, would pay to the plaintiff the sum of twelve and a half cents per tree for each and every tree so as aforesaid sold and described, when they should be delivered in the fall aforesaid. And, for the faithful performance of the said agreement, the said parties bound themselves, etc., in the sum of \$1000, as by said articles, etc., would appear." The declaration then avers that the plaintiff, afterward, in the fall of the year aforesaid, to wit, on November 21st, in the year aforesaid, had on five several lots of ground, situate in the township of C., in said county, four thousand morus multicaulis trees, grown upon said lots, of the description named in the agreement, ready to be delivered, on said lots, to the defendant, where they remained ready to be delivered, of which the defendant afterward, on, etc., at, etc., had notice ; and although the defendant was requested to come to the lots and accept the trees, and pay therefor, yet he refused to accept and pay, and still continues, etc., contrary to his agreement, etc., concluding in the usual form of breach in such cases.

The second count is similar to the first, with this exception, that it does not state the number of lots upon which the trees were situate, but avers generally that the plaintiff had them upon the ground where they had grown, in the township of C., etc., ready to be delivered, etc.

To this declaration the defendant pleaded :

7. *Actio non* : because, he says, that after the making and executing the said articles of agreement, to wit, on March 20th, 1839, the said plaintiff made and executed to Craig Moffett and Mathew McHenry a deed of assignment of all his lands, tene-

ments, and hereditaments, goods, chattels, moneys, and effects, rights and credits whatsoever, and generally all his estate and property, real and personal, for the equal benefit of his creditors, pursuant to the statute in such case made and provided ; that the said assignees did accept of the said assignment, whereby the said plaintiff became and was divested of all his estate, real and personal, and of all interest whatsoever in and to the said articles of agreement, and the same became and was vested in the said Craig Moffett and Mathew McHenry, as assignees as aforesaid ; and this he, the said defendant, is ready to verify ; wherefore he prays judgment, etc.

To the seventh plea the plaintiff replied :

Precludi non : because, he saith, that before the making and execution of the deed of assignment in the said plea mentioned, to wit, on March 18th, 1839, at, etc., he, the said plaintiff, by writing under his hand endorsed on said articles, and for and in consideration of the sum of \$10, to him paid by one John Hitchens, did assign all the right, title, and interest of the said plaintiff to the said articles of agreement to the said John Hitchens, and did authorize him to fulfil the contract contained in said articles, as fully as the said plaintiff himself could have done, and did then and there deliver the said articles to the said John Hitchens, of which said several premises the said defendant afterward, to wit, on the day and year last aforesaid, had notice. And the said plaintiff further saith, that the writ of summons in this case was sued out in the name of him, the said plaintiff, for the use and on the behalf of the said John Hitchens, and for the purpose of enabling him, the said John Hitchens, to recover and receive the said sum of money stipulated to be paid by the said defendant, upon the delivery to him of the said trees in the said declaration mentioned, according to the form and effect of the said articles of agreement, and not for the benefit, use, or behoof of the said plaintiff ; that is to say, at, etc., and this he is ready to verify ; wherefore he prays judgment and his damages,¹ etc.

Argued before Nevius, Carpenter, and Ogden, JJ.

IV. L. Dayton for plaintiff.

P. D. Vroom, contra.

CARPENTER, J., delivered the opinion of the Court.

The case, as presented by the pleadings, is in substance this : The parties, January 19th, 1839, entered into this covenant, that the defendant, for four thousand morus multicaulis trees, on that day sold to him by the plaintiff, to be delivered on the

¹ Only so much of the case is given as relates to the question raised by the seventh plea and the replication thereto.—ED.

ground where the said trees should grow, in the fall months of the same year, and to be of a stipulated character, would pay the plaintiff twelve and a half cents for each tree so as aforesaid sold and described, when they should be delivered. On March 18th, 1839, the plaintiff, by endorsement on the covenant, assigned his interest in the contract to one John Hitchens; and on March 20th, 1839, the plaintiff made a general assignment, under the statute, for the benefit of his creditors.

The replication to the seventh plea presents the question, whether the contract was one which could be assigned, and the beneficial interest pass under such assignment to Hitchens; so that he could fulfil the terms of the contract, and maintain an action for its breach against the opposite party, in the name of the plaintiff. If it can so pass, by priority in time, undoubtedly, it will be protected against the subsequent general assignment.

It was a well-known rule of the common law, that a mere thing in action was not assignable at law, with the exception of negotiable instruments, unless by statute; such is still the general rule, at least without the assent of the debtor. But it is otherwise in equity, where one party may purchase by assignment the whole interest of another in a contract, or security or other property, even in litigation, provided there be nothing which savors of maintenance. Thus an equitable interest under a contract for the purchase of real estate may be the subject of sale, the original holder becoming in such case a trustee for the sub-purchaser to whom such sale is made; and he will be compelled, under proper indemnity, to permit his name to be used in any proceedings necessary for obtaining the benefit of the contract. Even unearned freight has been held the subject of equitable agreement or assignment, which will be protected at law as well as in equity. *Leslie v. Guthrie*, 1 Bing. N. Cases, 699. See 2 Story Eq. Jur., § 1050, 1055, and Cases.

The doctrine of equitable assignments, having its origin in courts of equity, has been followed to a great extent in courts of law, though the mode in which equitable rights are there protected or enforced is limited by technical forms and arbitrary rules. So far have courts gone that it has even been said of the ancient rule, that choses in action are not assignable, that it only remains to give form to some legal proceedings. One form in which the rule still remains is, that when a debt or other chose in action is assigned, ordinarily it is necessary to sue at law in the name of the original creditor, the person to whom transferred being treated rather as an attorney than an assignee; though his rights will be recognized and protected, to some extent at least, even in a court of law. *Sloan v.*

Somers, 2 Green, 510 ; Winch v. Keeley, 1 T. R. 619 ; Welch v. Mandeville, 5 Wheat. 277. It was said by Justice Story, who delivered the opinion of the Court in the last case, that courts of law, following in this respect the rules of equity, now notice assignments of choses in action, and exert themselves to afford them any support and protection not inconsistent with the established principles and modes of proceeding which govern tribunals according to the course of the common law.

The authorities referred to in the progress of this opinion clearly show that beneficial contracts are assignable in equity, in which case, when *bona fide* and for a valuable consideration, the assignor becomes a trustee for the assignee, who is authorized to use the name of the former to enforce the interest which he has acquired. The necessary steps may be taken by the assignee, as the attorney or agent of the assignor, though for his own benefit ; and such equitable assignment previous to bankruptcy or insolvency, when necessary may be pleaded, many instances of which might be cited. See Parnham v. Hurst, 8 M. & W. 743, and Winch v. Keeley, already cited. When the plea, as here, sets up the insolvency of the assignor, the proper answer in the replication is, that the debt or contract, though in the name of the plaintiff, yet in substance belongs to a third party, and therefore did not pass under the assignment for the benefit of the creditors ; if not, it is still in the plaintiff, for the benefit of such third person, and the action can be maintained.

The pleas demurred to are overruled, and the replication to the seventh plea sustained.

Judgment for the plaintiff.

BRICE v. BANNISTER.

IN THE COURT OF APPEALS, MAY 18, 1878.

[*Reported in Law Reports, 3 Queen's Bench Division 569.*]

CLAIM stated that John Gough, by an order in writing under his hand, directed to the defendant, bearing date on or about October 27th, 1876, absolutely assigned to the plaintiff the sum of £100, money due or to become due of John Gough in the hands of the defendant, of which order due notice was given to the defendant, and the defendant thereupon accepted the same. At the time of the making of the order in writing and at the time of notice thereof to the defendant he was indebted to John

Gough in divers sums of money more than sufficient to pay the sum of £100 assigned by John Gough to the plaintiff. The plaintiff had on more than one occasion demanded from the defendant payment of the sum of £100, but the defendant had not paid it or any part of it.

The nature of the defence appears from the facts hereinafter stated.

At the trial at the Somersetshire Summer Assizes, 1877, before Lord Coleridge, C.J., without a jury, the following facts were proved. The plaintiff is a solicitor at Bridgwater, and the defendant is a shipowner residing at Barrow-in-Furness. The defendant had entered into a contract with John Gough, dated May 17th, 1876, by which Gough agreed to build for the defendant a vessel on certain terms. The material part of the contract is as follows: "The vessel to be completed by December 30th, 1876, for the sum of £1375. Payments to be made as follows:

When keel and stern post up and floors across	£250
When in frame	250
When planked	400

and the remainder when completed and handed over with Lloyd's, Board of Trade, and builder's certificates."

The contract was in the course of being performed by John Gough between the date of the contract, May 17th, 1876, and the completion of the vessel, February 11th, 1877. The first instalment under the contract became due on June 22d, 1876, the second instalment became due on October 11th, 1876, and the third instalment became due on November 23d, 1876, and the remainder was due on the completion of the vessel, February 11th, 1877.

Gough was unable to finish the vessel without assistance from the defendant, and therefore during the progress of the building the latter advanced to him sums of money, which were necessary to enable him to pay the wages of his workmen employed in building the vessel and to pay for the materials used in constructing her. The total amount of these advances upon October 27th, 1876, was £1015. That sum was in excess of the amount then due pursuant to the contract.

On October 27th, 1876, Gough, being indebted to the plaintiff to an amount exceeding £2000, gave the plaintiff an order addressed to the defendant in the following terms:

"I do hereby order, authorize, and request you to pay to Mr. William Brice, Solicitor, Bridgwater, the sum of £100 out of moneys due or to become due from you to me, and his receipt for same shall be a good discharge."

On the same day, October 27th, 1876, the plaintiff gave the defendant written notice of the order in the following terms :

" I hereby give you notice that by a memorandum in writing dated October 27th, 1876, John Gough, of this place, authorized and requested you to pay me the sum of £100 out of money due or to become due from you to him, and my receipt for the same shall be a good discharge."

The defendant acknowledged the receipt of the notice, but declined to be bound by it as an authority to pay £100 to the plaintiff.

Subsequently to the receipt of the notice, the defendant paid to Gough on account of the building of the vessel, pursuant to the contract, sums far exceeding £100 ; and unless the defendant had made such payments to Gough, he would not have been able to complete the vessel.

On these facts it was contended by the defendant's counsel that the judgment ought to be entered for the defendant, on the following grounds :

1. That at the time of giving the order there was nothing due to Gough, and therefore there was nothing which could be assigned by him to the plaintiff by virtue of the Judicature Act, 1873, § 25, sub-sec. 6.¹

2. That there was no binding acceptance of the order by the defendant.

3. That had not the defendant made advances to Gough or to his creditors, other than the plaintiff, Gough would never have been in a position to become a creditor of the defendant.²

¹ By the Supreme Court of Judicature Act, 1873 (36 & 37 Vict., c. 66), § 25, sub-sec. 6, " Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt, or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor : Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice, under and in conformity with the provisions of the Acts for the relief of trustees."

² Lord Coleridge, C.J., whose opinion has been omitted, directed judgment to be entered for the plaintiff for £100.—ED.

Cole, Q.C., and *Bullen* for the defendant.

A. Charles, Q.C., and *Herbert Reed* for the plaintiff.

The following judgments were delivered :

COTTON, L.J. The letter of October 27th is a good equitable assignment by Gough to the plaintiff of money to the extent of £100, which might become due under his contract with the defendant. To this extent he thereby anticipated the moneys payable from the defendant to him, and Gough became incompetent to deal with these moneys to plaintiff Brice's prejudice, and the defendant, after notice of the letter, could not come to any agreement with Gough dealing with or anticipating these moneys to the prejudice of the plaintiff. At the time when notice of the letter of October 27th was given to the defendant, the balance of the contract price which remained unpaid exceeded £100, and the ship has been completed under the contract. The question is whether in substance what has been done by Bannister and Gough was not a dealing with the moneys payable under the contract ; I think it was. The contention of the defendant was that though, after notice of the assignment to the plaintiff he had paid moneys exceeding £100 to Gough, he did so not in payment of the price or under the contract, but that the advances were necessary in order to secure the completion of the ship. But this is not a case where the builder having failed in his contract the person for whom he was building put an end to the contract and completed the work. In such a case, the builder, if he in fact completed the work, would be employed as agent or servant doing the work for the owner of the vessel. Here the builder completed the work as contractor building under a contract with the defendant, and this is the distinction between this case and *Tooth v. Hallett*¹ where the work was completed after the bankruptcy of the builder by his trustee out of his own moneys, and the person for whom the work was done had power to take possession and employ any one to complete the building, and in effect he did so, and the Court allowed the expenditure against the equitable assignee. It is probable that Gough would not, unless he had obtained the advances made by the defendant either from him or from some other person, have been able to complete the vessel ; but a charge for the money lent after October 27th, by any other person for the purpose of paying wages or buying material necessary for the completion of the ship, and in that sense necessary to enable the money to become due to Gough, could not be preferred to the plaintiff's claim. Moneys paid for the same purpose to Gough by the

¹ Law Rep. 4 Ch. App. 242.

defendant cannot, in my opinion, stand in a better position. It was urged that the assignee of a chose in action takes subject to all equities. But these must be equities existing or arising out of circumstances existing before notice is given of the assignment ; the advances made by the defendant were in no way sanctioned by the contract, and in no sense an equity between Gough and the defendant existing or arising from circumstances existing at the date of the notice to the defendant of the assignment to the plaintiff. The plaintiff was assignee for value of the moneys payable under the contract, without any deduction for cost of materials or other costs of construction. The defendant, for his own purposes, determined not to complete the ship himself, but to let Gough do so under the contract. To enable him to do so he, after notice of the assignment to the plaintiff, paid money to Gough so as to exhaust the contract price. By so doing, he could not, in my opinion, defeat or prejudice the plaintiff's right, and the judgment appealed from must in my opinion be affirmed.

BRETT, L.J. I am sorry to say that, with great hesitation, I differ from the judgment which has been read. I consider the principle involved in this case to be of the highest importance. The defendant and Gough were parties to a contract for building a ship, the price of which was to be paid by instalments at different stages of the building, and the ship was to become the property of the purchaser according to the different times of the payments. Before the ship was finished the builder, through want of funds, became unable to proceed with the work. I do not mean to say that there is any finding that the defendant as purchaser was compelled to take possession of the ship if he did not advance money ; but practically if he did not advance money the ship must have been thrown upon his hands, and he must have completed the building of the ship, a most onerous charge upon him. It is an ordinary mode of meeting a difficulty of this kind, an ordinary mode of transacting business, either that the purchaser shall take the ship into his own hands, or that he and the builder shall agree to modify the contract, so that he, instead of paying the purchase-money after a stage of work is completed, should advance the money beforehand ; or, as it may be put in another way, the purchaser, when the builder is in difficulties, before the time of payment fixed by the contract has arrived, advances money upon the terms that he is to repay himself out of the money which he would have to pay when a particular stage is completed. It is true that the builder, in consideration of money

previously advanced by the plaintiff, made an equitable assignment to him of the money which would become due to him at a following stage, and he afterward did procure an advance before the appointed time from the defendant, in order to enable him to complete the ship. It is true that the defendant had notice of this so-called equitable assignment; but it was a matter between the builder of the ship and a third person, over which the defendant, the purchaser of the ship, had no control; and the question is whether we are to allow an equitable doctrine to hamper and impede an ordinary business transaction. I cannot bring myself to agree that, either by virtue of the Judicature Act or otherwise, business transactions are to be hampered by any doctrine which will prevent a man from doing what he otherwise might do, merely because something has happened between other parties. I would therefore confine this remedy to a case where a debt has actually accrued due from one person to another, or at least I certainly would confine it simply to the case where nothing remains to be done by the person who is the assignor. In that case nothing remains to be done by him but to receive money from the person who is to pay him, and that money he makes over to the equitable assignee. But I cannot bring my mind to think that this doctrine should be extended, so as to prevent the parties to an unfulfilled contract from either cancelling or modifying, or dealing with regard to it in the ordinary course of business. I quite agree that they ought not to be allowed to act *malâ fide* for the purpose of defeating an equitable assignee; but if what they do is done *bona fide* and in the ordinary course of business, I cannot think their dealings ought to be impeded or imperilled by this doctrine, and it seems to me the purchaser of a ship and the builder might have cancelled the contract even after this assignment. Why may they not modify it? If they cannot modify it, it seems to me to denote a state of slavery in business that ought not to be suffered; but I apprehend the parties to the contract can modify it. If they can modify it, why may they not act so that no money shall be due from the defendant in this case to the plaintiff? It seems to me there never was any money due to the assignor of the plaintiff. Before that money became due, it was absorbed either by an advance made *bona fide* by the present defendant to the builder, or by a modification of the contract. The builder never could have sued this defendant for money due to him as for a debt; and therefore it seems to me no equitable assignment ought to be allowed to charge the defendant and make him practically pay twice over.

In what cases has this equitable doctrine been applied? Sup-

pose a man writes upon paper, "I promise to pay A. B. the sum of £100 on demand:" the document, not being payable to bearer or to order, is not a promissory note, assignable or negotiable by statute or the law merchant. Has any Court of Equity ever held, that if a person received such a paper it could be sued upon after being handed over to a third person? But this equitable doctrine would make a promissory note not payable to bearer an order transferable to a third party, without any writing upon it, and I apprehend that is directly contrary to all practice, custom, and law, and shows that this doctrine is not to be allowed to control or hamper ordinary business transactions.

I am, therefore, of opinion in this case the doctrine ought not to be allowed to hamper and impede the ordinary transactions which occurred between the defendant and the builder. The defendant had a right, with the consent of the builder, to modify this contract, and he modified it so far and to such a degree that no money was ever due from the defendant to the builder, and therefore the equitable assignment by the builder to the plaintiff had no legal or binding effect whatever. Therefore I am of opinion that the defendant in this case is entitled to succeed.

BRAMWELL, L.J. I have reluctantly come to the conclusion that this judgment should be affirmed. I say reluctantly, because I feel the great force of my brother Brett's observations; it does seem to me a strange thing and hard on a man, that he should enter into a contract with another and then find that because that other has entered into some contract with a third, he, the first man, is unable to do that which it is reasonable and just he should do for his own good. But the law seems to be so; and any one who enters into a contract with A. must do so with the understanding that B. may be the person with whom he will have to reckon. Whether this can be avoided, I know not; maybe, if in the contract with A. it was expressly stipulated that an assignment to B. should give no rights to him, such a stipulation would be binding. I hope it would be. But as there is no such clause in the contract here, the plaintiff has undoubtedly certain rights—to what? If it were only to money payable according to the terms of the contract, the plaintiff would fail, for no money ever became due according to the terms of the contract. It was paid in advance before the work was finished; so that an amendment of the statement of claim is necessary; and in strictness the plaintiff's case is this: "You, the defendant, had no right to pay in advance; you were bound to wait till the work was finished; you would then

owe Gough money, and would then be bound to pay me." This seems to be the law, and certainly if Gough and the defendant had agreed to anticipate the time of payment to defeat the plaintiff, such a scheme ought not to succeed. On the other hand, if Gough had broken his engagement, or threatened to break his engagement to finish the vessel, or to finish it in a reasonable time, and the defendant to remedy and avert such breach, reasonably and *bona fide*, not to defeat the plaintiff but to protect himself, advanced money to Gough before it was due, so that it never became due according to the contract, I should have hesitated long before holding that the defendant was liable in this action. But in reading the correspondence I cannot see that this was the case. That the defendant acted *bona fide* I doubt not, but I think his advancing of the money as he did was quite voluntary and in no sense compulsory. I concur, therefore, in affirming the judgment.

Judgment affirmed.

JOHN HEERMANS, TRUSTEE, ETC., APPELLANT, v.
S. STEWART ELLSWORTH, RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, FEBRUARY 8, 1876.

[Reported in 64 *New York Reports* 159.]

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported below. 5 T. & C., 605 ; 3 Hun, 473.)

This action was brought by plaintiff as trustee claiming under a deed in trust executed by one Joseph Fellows of his property, real and personal, to recover a balance of account for moneys loaned by said Fellows to defendant.

The defence was payment, and defendant proved payment to Fellows after the execution of the trust deed. Prior to the payment an action was brought by Fellows against plaintiff to revoke the trust deed. Defendant was subpœnaed and examined as a witness therein. Other evidence on plaintiff's part tended to show notice. Defendant testified that at the time of the payment he had no knowledge or notice of the trust deed.

Upon the question of notice the Court charged as follows : " The burden of proof is upon the plaintiff upon this question, and it is incumbent upon him to establish the fact of notice by a fair preponderance of evidence. If the testimony is simply balanced, the defendant is to prevail." To which charge plain-

tiff's counsel duly excepted. Said counsel requested the Court to charge that the burden of proof was upon the defendant, to show that the payment was made without notice and in good faith. The Court refused so to charge, and the plaintiff's counsel duly excepted. Said counsel also asked the Court to charge that the pendency of the action between Fellows and plaintiff was constructive notice to the defendant and conclusive upon him in this action. The Court refused so to charge, and said counsel duly excepted.

A. Hadden for the appellant.

Geo. B. Bradley for the respondent.

MILLER, J. There was no error in the charge of the judge upon the trial, that the burden of proof was upon the plaintiff, upon the question of notice, and that it was incumbent upon him to establish the fact of notice ; nor in the refusal to charge that the burden of proof was upon the defendant to show that the payment was made without notice and in good faith. The debt was due to Fellows, and he being the creditor, it is a fair legal presumption that such creditor was lawfully entitled to receive payment. If an assignment was made by Fellows to the plaintiff, it was the duty of the assignee to establish that the debtor was notified in order to protect himself against any payment to the original creditor. This rule is fully established by authority. See *Meghan v. Mills*, 9 J. R., 64 ; *Anderson v. Van Allen*, 12 J. R., 343 ; *Briggs v. Dorr*, 19 J. R., 95 ; *Say v. Dascomb*, 1 Hill, 552 ; *Field v. The Mayor*, 2 Seld., 179. At common law an action to recover upon an instrument not negotiable, was necessarily brought in the name of the original owner or payee, and if payment was pleaded it was not enough that the replication denied the payment, without averring both the assignment and notice of the transfer before payment. 19 J. R., 95 ; 1 Hill, *supra*. Unless this was done the pleading was insufficient, and the proof could not be given.

Proof of payment to the creditor establishes a complete defence, and when this is made out it belongs to the other side to answer or avoid it by evidence of the assignment of the demand and notice thereof to the debtor. As he alleges that the payment was not made to the proper person he is bound to establish it. It is entirely evident that the onus is upon him, and he has the affirmative upon such an issue. *Hollister v. Bender*, 1 Hill, 150, is not in conflict with the rule stated. As there said, the substance of the allegation to be tried determines where the onus lies, and as the assignment and notice were the very essence of the plaintiff's right to recover, the burden was upon him. There is no principle of pleading which can distur

or alter the rule laid down. Nor is there any ground for claiming that the necessity for such a rule no longer exists, since parties are allowed to be witnesses on their own behalf. This furnishes no sufficient or satisfactory reason for changing a rule of evidence long established, and which is founded upon a settled principle.

The remarks of the learned judge who wrote the opinion in *Bush v. Lathrop*, 22 N. Y., 535, have no direct bearing upon the question considered, as that case is not analogous.

Nor was there any error in the refusal to charge the jury that the pendency of the action between Fellows and Heermans was constructive notice to the defendant of the existence of the deed. It is not claimed that it operated as a notice of *lis pendens* strictly, and whether the defendant had notice of the character of the action so as to put him on inquiry, from the fact of his being sworn as a witness in the case, or from any other circumstances, was a question of fact for the jury to determine. The discussion already had disposes of the case, and no other question is presented which demands comment.

The judgment was right and should be affirmed.

All concur.

Judgment affirmed.

MILLER & REIST v. KREITER TO THE USE OF
BOMBERGER.

IN THE SUPREME COURT OF PENNSYLVANIA, MAY 5, 1874.

[Reported in 76 Pennsylvania State Reports 78.]

BEFORE Agnew, C.J., Sharswood, Williams, Mercur, and Gordon, JJ.

Error to the Court of Common Pleas of Lancaster County : Of May Term 1874, No. 19.

This was an action of *assumpsit*, brought January 25th, 1872, by C. W. Kreiter to the use of Isaac F. Bomberger, against S. C. Miller and A. H. Reist, on a joint and several non-negotiable note, dated January 9th, 1871, payable to Kreiter in one year for \$2000. The defendants pleaded payment with leave, etc., and set-off.

The defendants and Kreiter had been in business together as partners, and, on arranging their business, this note was given by the defendants to Kreiter for his interest in the firm. It was agreed at the same time that notes in the Inland Insurance

Company or any other institution which Kreiter had drawn in the name of the firm and used the money himself, should be set off against this note which was drawn non-negotiable to enable the set-off to be made. Kreiter assigned this note to Bomberger, the use-plaintiff, by the following endorsement on it :

"I hereby transfer my right, title, and claim to the within note to I. F. Bomberger, for the consideration as collateral security, for endorsing me on a note discounted in the Litiz Deposit Bank.

C. W. KREITER."

The set-off above mentioned was conceded on the trial, and there then remained \$675.34 due on the \$2000 note.

To this balance the defendants claimed to make a further set-off arising from the following note :

"LANCASTER, April 8th, 1871.

"Sixty days after date, I promise to pay to the order of John S. Hostetter, thirteen hundred dollars, at the First National Bank of Lancaster, without defalcation, for value received.

C. W. KREITER.

"Credit the drawer, }

"John S. Hostetter. }

"Endorsed—John S. Hostetter, A. H. Reist."

Protested for non-payment, June 10th, 1871.

This note passed into the hands of A. S. Bard, who brought suits on it against Kreiter, Hostetter and Reist ; and on April 6th, 1872, recovered judgment in each suit for \$1366.46. Reist paid the amount of this judgment. The judgments against Kreiter and Hostetter were assigned to him May 20th, 1873, and that against himself marked satisfied.

On the trial, August 30th, 1873, before Hayes, J., the foregoing facts appeared in evidence. Isaac F. Bomberger testified also : "I had been endorser for C. W. Kreiter on two notes—one for \$1500, and one for \$2000, and also guaranteed a check for \$850. I refused to endorse any longer unless he would give me some collateral security ; he was then solvent ; had real and personal property ; he may have been insolvent, but he owned a good deal of property ; he was not sold out ; he came to me with this note signed by A. H. Reist and S. C. Miller ; represented, or said this note represented, his interest in a liquor store in Lancaster, of which he was a partner with Miller & Reist ; said he was still a partner, and the word order was left out because he was a silent partner. I paid nothing additional, but I guaranteed a check at the time this note of Miller & Reist was transferred to me. This transfer was written at the time the note was given to me."

The Court, after stating the facts, charged : . . .

"The difficulty depends upon the claim of set-off in relation to the debt due from C. W. Kreiter to A. H. Reist, which the defendants claim to set off in this action, together with the notes paid to the Inland Insurance and Deposit Company. With respect to the latter there is no longer any dispute, it being conceded that the defendants are entitled to set off them ; but it is objected to the note left for collection with the First National Bank, and which A. H. Reist, being an endorser, has paid for C. W. Kreiter, that it cannot be a proper subject of set-off in this case, which is a suit against two defendants, and the other was in no way responsible for this note, and the debt due from the plaintiff on that account is to the other defendant. [A set-off in general cannot be claimed by one of two or more defendants in the same suit for a debt due to one only, which, being this case, defeats the claim as to this note, if there be nothing to make it an exception to the rule—some superior equity in A. H. Reist's claim over and above that of Isaac F. Bomberger.] [Again, the set-off must depend upon the condition of the claim at the time of the suit brought ; it must have existed at that time. In this case A. H. Reist had not paid this note when the present suit was brought, but paid it more than a year afterward.]

"I am, therefore, of opinion, that [unless the jury believe, on a review of the transactions of these parties, that the defendant, A. H. Reist, has some equity superior to that of Isaac F. Bomberger, the real plaintiff, his claim to set off the note left with the First National Bank cannot be maintained, more especially as he acquired the claim long after this suit was brought."]

The verdict was for the plaintiff for \$675.34.

The defendants took a writ of error, and assigned for error the parts of the charge in brackets.

T. E. Franklin (with whom was *N. Ellmaker*) for plaintiffs in error.

D. McMullen for defendant in error.

GORDON, J., delivered the opinion of the Court, May 25th, 1874.

Reist, the defendant, by his endorsement of the note drawn by Kreiter to Hostetter, became surety for Kreiter. Hence, as soon as the note was protested, June 10th, 1871, and Reist's liability as endorser became fixed and absolute, he was entitled to call upon the maker to exonerate him from such liability, and that even before demand was made upon him for payment. *Beaver v. Beaver*, 11 Harris, 167. His right of set-off, as against any claim Kreiter had against him, may be said to have origi-

nated from this period. When, therefore, he paid the note on which he was endorser, May 20th, 1873, he was, by force of his equitable status, put in the same position as if he had paid it at the time of protest. Again, as there is no evidence of the date of the assignment to Bomberger of the non negotiable note drawn by Miller & Reist, on which this suit is founded, and as Reist had no notice thereof previously to the service of the summons, January 25th, 1872, as against him, it could be effective only from that date; for the rule is, that the period from which to determine the rights of the assignee and defendant is not the date of the assignment, but the time when the latter had notice, *Northampton v. Balliet*, 8 W. & S., 311. It follows, therefore, that Reist's equitable set-off having arisen before the assignment to Bomberger, he had the right to defalk his claim against the note in suit, and the Court should so have ruled.

The counsel for the defendant in error is mistaken in the supposition that one of two or more defendants may not set off his individual claim against the joint claim of the plaintiff. The converse of this is held in *Childerston v. Hammon*, 9 S. & R. 67, and *Archer v. Dunn*, 2 W. & S. 361.

Judgment reversed, and a *venire facias de novo* awarded.

THE GOSHEN NATIONAL BANK *v.* WILLIAM BINGHAM ET AL.

WILLIAM BINGHAM ET AL. *v.* THE GOSHEN NATIONAL BANK.

IN THE COURT OF APPEALS OF NEW YORK, JANUARY 14, 1890.

[*Reported in 118 New York Reports 349.*]

APPEALS from judgments rendered by the General Term of the Supreme Court in the first judicial department, entered upon orders made March 31st, 1887, which affirmed a judgment in the action first above entitled in favor of defendants and a judgment in action second above entitled in favor of plaintiffs, both of which were entered upon the reports of a referee.

On November 27th, 1884, Benjamin D. Brown applied to the cashier of the Goshen National Bank, appellant, at Goshen, N. Y., to cash a sight draft for \$17,000, drawn by him upon the firm of William Bingham & Co., of New York, the individual members of which firm are the respondents, accompanied by a quantity of the bonds of the West Point Manufacturing Company, of the

face value of \$17,000. Brown represented that he had negotiated a sale of these bonds at their face value with William Bingham & Co. ; that they had directed him to draw upon them at sight for \$17,000, the draft to be accompanied by the bonds, and that the draft would be paid upon presentation. Such representations were absolutely false. The bonds had no market value. Brown was a bankrupt and had no funds in the bank except such as resulted from the credit given him upon the faith of the draft on Bingham & Co., accompanied by the bonds. The cashier of the Goshen National Bank, relying upon such representations, cashed the draft of \$17,000, and placed the proceeds to the credit of Brown upon the books of the bank. He gave Brown sight drafts on New York for \$12,000, and certified a check drawn by Brown to his own order, dated November 26th, 1884, for \$5000. On the morning of November 28th, Brown called at the office of William Bingham & Co., and stated that he wanted to get some currency. Mr. Bingham passed the check to the firm's cashier directing him to give Brown currency for the amount. The cashier gave him a check drawn on the Corn Exchange Bank for \$5000. Brown had the check cashed at the Corn Exchange Bank. He also had the New York drafts cashed, amounting to \$12,000, which he had obtained from the Goshen National Bank. After procuring the checks and drafts to be cashed, he fled to Canada, where he remained at the time of the trial of these actions. When Bingham & Co. took from Brown the check certified by the Goshen National Bank it was not endorsed.

The referee found in the action second entitled that "at the time of the transfer of the said certified check by Brown to the plaintiffs, it was intended both by Brown and the plaintiffs that said certified check should be endorsed by Brown, and it was supposed by both parties that he had so endorsed it, and if the plaintiff had known that it was not endorsed they would not have paid the consideration therefor."

He found, in the action second entitled, "that Brown made no statement to the defendants, or either of them, at the time of the transfer of the check that such check was endorsed."

And "prior to the commencement of the action of replevin the defendants never requested Brown to endorse said check."

While Bingham & Co. held the check in question unendorsed, a demand for its return to the bank, accompanied by a full explanation of the circumstances under which the certification was obtained, was made upon Bingham & Co., in behalf of the bank, and upon their refusal to return it, an action to recover its possession was commenced by the bank against Bingham & Co.

That action is, firstly, above entitled.

Subsequently, and on December 16th, Bingham & Co. obtained from Brown a power of attorney to endorse the check. Pursuant thereto the check was endorsed and payment there-after demanded of the bank.

This was refused, and thereupon the action, secondly, above entitled, was commenced by Bingham & Co., to recover the amount of the check.

Henry Bacon for appellant.

Joseph F. Mosher for respondents.

PARKER, J. As against Brown, to whose order the check was payable, the bank had a good defence. But it could not defeat a recovery by a *bona fide* holder to whom the check had been endorsed for value. By an oversight on the part of both Brown and Bingham & Co. the check was accepted and cashed without the endorsement of the payee. Before the authority to endorse the name of the payee upon the check was procured and its subsequent endorsement thereon, Bingham & Co. had notice of the fraud which constituted a defence for the bank as against Brown. Can the recovery had be sustained?

It is too well settled by authority, both in England and in this country, to permit of questioning, that the purchaser of a draft, or check, who obtains title without an endorsement by the payee, holds it subject to all equities and defences existing between the original parties, even though he has paid full consideration, without notice of the existence of such equities and defences. *Harrop v. Fisher*, 30 L. J. (C. L., N. S.), 283; *Whistler v. Forster*, 14 C. B. (N. S.) 246; *Savage v. King*, 17 Me. 301; *Clark v. Callison*, 7 Ill. 263; *Haskell v. Mitchell*, 53 Me. 468; *Clark v. Whitaker*, 50 N. H. 474; *Calder v. Billington*, 15 Me. 398; *Lancaster Nat. Bank v. Taylor*, 100 Mass. 18; *Gilbert v. Sharp*, 2 Lans. 412; *Hedges v. Sealy*, 9 Barb. 214-218; *Franklin Bank v. Raymond*, 3 Wend. 69; *Raynor v. Hoagland*, 7 J. & S. 11; *Muller v. Pondir*, 55 N. Y. 325; *Freund v. Importers' & Traders' Bank*, 76 N. Y. 352; *Trust Co. v. Nat. Bank*, 101 U. S. 68; *Osgood v. Artt*, 17 Fed. Rep. 575.

The reasoning on which this doctrine is founded may be briefly stated as follows: The general rule is that no one can transfer a better title than he possesses. An exception arises out of the rule of the law merchant, as to negotiable instruments. It is founded on the commercial policy of sustaining the credit of commercial paper. Being treated as currency in commercial transactions, such instruments are subject to the same rule as money. If transferred by endorsement, for value, in good faith and before maturity, they become available in the

hands of the holder, notwithstanding the existence of equities and defences, which would have rendered them unavailable in the hands of a prior holder.

This rule is only applicable to negotiable instruments which are negotiated according to the law merchant.

When, as in this case, such an instrument is transferred but without an endorsement, it is treated as a chose in action assigned to the purchaser. The assignee acquires all the title of the assignor, and may maintain an action thereon in his own name. And, like other choses in action, it is subject to all the equities and defences existing in favor of the maker or acceptor against the previous holder.¹

All concur, except Haight, J., not sitting.

Judgments accordingly.

HOWELL AND OTHERS v. MACIVERS AND OTHERS.

IN THE KING'S BENCH, MAY 19, 1792.

[*Reported in 4 Term Reports* 690.]

ASSUMPSIT on a contract by three. Plea, the bankruptcy of one of them before the action brought. Replication that before his bankruptcy he assigned his interest in the contract of the other two. To which there was a general demurrer, in support of which

Russell contended that the replication should have stated how the assignment was made, by what deed, so that the defendant might have craved oyer of it. In *Winch v. Keeley*² the assignment was by deed which was set out, and therefore this objection did not occur, though the Court there held that the interest which the bankrupt had assigned before his bankruptcy did not pass to his assignees under the commission.

Wood, contra. It is not necessary that an assignment of a chose in action should be by deed, and therefore it is no ground of demurrer that it is not so stated.

The Court were of the same opinion, but they gave leave to the defendant to withdraw the demurrer and take issue on the assignment.

¹ Only so much of the opinion is given as relates to this question.—ED.

² 1 T. R. 619.

DAVID RISLEY, RESPONDENT, v. THE PHENIX BANK
OF THE CITY OF NEW YORK, APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, JANUARY 18, 1881.

[Reported in 83 New York Reports 318.]

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made November 6th, 1879, affirming a judgment in favor of plaintiff, entered upon a verdict, and affirming an order denying a motion for a new trial.

The amended complaint in this action contained three counts, the first two set forth a check, dated May 20th, 1861, drawn by the Bank of Georgetown, S. C., upon defendant, payable to the order of plaintiff, for \$10,000, alleged to have been delivered to plaintiff by the drawer for a good and valuable consideration, and to have been drawn against a deposit with defendant, largely exceeding that amount to the credit of the drawer. The third count alleged an indebtedness of defendant to said Bank of Georgetown to the amount of \$10,000, an assignment on the date aforesaid of that amount of said indebtedness to plaintiff, a demand and refusal to pay.

The answer admitted that at the date of the check, and up to January 5th, 1865, said Bank of Georgetown had on deposit with it more than \$10,000, and alleged, among other things, that on that day the whole amount of said deposit "was duly seized and attached by the United States of America, and in and by virtue of certain proceedings duly had in the District Court of the United States for the Southern District of New York, said Court having jurisdiction in the premises, a monition was duly issued, and the same was duly served on this defendant by the United States marshal for the Southern District of New York, and thereupon such proceedings were duly had and taken in said Court, in those proceedings which said Court had jurisdiction thereof; that afterward, and on or about January 24th, 1865, a certain decree of said Court was duly given and made, and thereupon and on said day a duly authenticated copy thereof was duly served upon this defendant, and in pursuance of said decree on the said last-named day, the said defendant delivered to the said marshal . . . the whole sum then on deposit with said defendant to the credit of said Bank

of Georgetown, and being the same moneys seized and attached as aforesaid."

The facts appearing upon the trial are sufficiently set forth in the opinion.

Samuel Hand for appellant.

James E. Risley for respondent.

ANDREWS, J. The check drawn by the Bank of Georgetown on the defendant, having been drawn on the general deposit of the drawer in the hands of the drawee, in the ordinary form of a bank check, did not, of itself, operate as an equitable assignment to the payee of the fund to the amount of the check. The check was a bill of exchange within the statute that no person shall be charged as an acceptor of a bill of exchange, unless his acceptance shall be in writing; and the defendant not having made a written acceptance of the check, no right of action thereon accrued to the plaintiff by reason of the verbal promise to pay the check made by the defendant on its presentation. 1 R. S. 768, § 6; *Harker v. Anderson*, 21 Wend. 372; *Luff v. Pope*, 5 Hill, 413; *Chapman v. White*, 6 N. Y. 412; *Duncan v. Berlin*, 60 N. Y. 153; *Atty.-Gen. v. The Continental Life Ins. Co.*, 71 N. Y. 333.

The Court on the trial ruled in accordance with the settled doctrine upon this subject, that the plaintiff was not entitled to recover upon the cause of action founded upon the check and the verbal promise of payment. But the Court further ruled that he was entitled to recover upon the third cause of action, which alleged an assignment of \$10,000 of the debt owing by the defendant to the Bank of Georgetown, made on May 20th, 1861, the day on which the check was dated and delivered to the plaintiff, if the jury should find that concurrently with the giving of the check there was an oral agreement, for a valuable consideration made between the Bank of Georgetown and the plaintiff, to assign to the latter \$10,000 of its debt against the Phenix Bank. The Court stated to the jury that if the transaction between the plaintiff and the Bank of Georgetown was simply a purchase of the check or draft, the plaintiff could not maintain the action, and that the question for the jury to determine was "whether there was, independent of the check, an agreement of assignment and purchase and sale of \$10,000 of the debt from the Phenix Bank to the Bank of Georgetown;" and that if there was such an agreement, the plaintiff was entitled to recover.

The Phenix Bank, prior to May 20th, 1861, was the correspondent in the city of New York of the Bank of Georgetown, a banking corporation located at Georgetown, S. C., and on

that date there was on its books a credit to the Bank of Georgetown to the amount of about \$18,000, derived from deposits and collections, which sum was then owing by the Phenix Bank to the Bank of Georgetown. The plaintiff was a resident of Georgetown, and had dealings with the Bank of Georgetown. He was examined on the trial, as a witness in his own behalf, and testified in substance that on the day when the check was dated, the president of the bank stated to him that the bank had a claim of \$17,000 or \$18,000 against the Phenix Bank, and offered to sell it to the plaintiff, stating as a reason that he was afraid it might be lost during the war, and that he was unwilling to carry the risk ; that the plaintiff offered to purchase the claim at fifty cents on the dollar, which offer was declined, and the president then offered to sell it for Southern bank bills at par ; that the plaintiff then offered, if the bank would divide the claim, to purchase \$10,000 of it, upon the terms proposed, which offer was accepted, and the plaintiff thereupon paid the \$10,000 ; that a question arose as to what kind of a transfer should be given, and the president of the bank said he would give the plaintiff an order on the Phenix Bank for the amount, and thereupon gave the plaintiff the check before referred to, and this completed the transaction between the plaintiff and the Bank of Georgetown.

The check was not presented to the Phenix Bank for payment until January 4th, 1865. The plaintiff testifies that on that day he presented the check at the bank to the president, and told him he had called to collect it ; that the president, after looking at the check, said it was good, and that it would be paid on presentation by some person known to the bank ; that he thereupon stated to the defendant's president that the Bank of Georgetown had transferred to him so much of its claim against the defendant as was represented by the check. The next day the check was again presented by a person known to the defendant, and the bank then refused payment, on the ground that the debt had, on the morning of that day, been seized by the United States, as forfeited under the confiscation acts of Congress. The amount standing to the credit of the Bank of Georgetown, on the books of the Phenix Bank January 4th, 1865, was \$12,117.38. The credit existing May 20th, 1861, had been reduced by checks charged against the account, drawn by the Bank of Georgetown, after that date, and paid by the Phenix Bank ; but no new deposit had been made, and the Phenix Bank had no lien upon or relation to the fund remaining in its hands January 4th, 1865, except as simple depository of the Bank of Georgetown. The defendant denied in its an-

swer the assignment alleged in the complaint, and sought to discredit the plaintiff's testimony in respect to the purchase from the Bank of Georgetown, by introducing his testimony on a former trial, in which he made no allusion to the negotiation for the purchase of the claim to which he testified on this trial. The defendant also controverted the plaintiff's evidence upon the point of notice to the officers of the defendant, of the transfer to him by the Bank of Georgetown of \$10,000 of its claim. But the jury found for the plaintiff upon these controverted questions, and their finding is conclusive upon this appeal.

It is claimed, however, that, admitting the truth of the plaintiff's narration of the transaction with the Bank of Georgetown, it did not, in law, constitute an assignment by the bank to the plaintiff of \$10,000 of the debt against the defendant, for the reasons, first that the contract actually made was reduced to writing, and is represented by the check, and that oral evidence was inadmissible to show that anything else was contemplated by the parties, except the sale and purchase of a bill of exchange, with the ordinary incidents flowing from that transaction; second, that there was no delivery of any account, document, or writing showing the existence or character of the debt undertaken to be assigned; and, third, that the alleged assignment only included a part of the general fund on deposit with the defendant to the credit of the Bank of Georgetown.

We are of opinion that neither of these objections is tenable. The relation between the Phenix Bank and the Bank of Georgetown was that of debtor and creditor. The order drawn by the Bank of Georgetown upon the Phenix Bank was not a contract between the parties to this action; and as between the plaintiff and the Bank of Georgetown, the giving of the order was equally consistent with the ordinary transaction of the purchase of a draft or the assignment of the debt against the Phenix Bank to the amount of the order, and the taking of the order as a convenient method of enabling the plaintiff to collect and receive the portion of the debt assigned. The fact that the plaintiff became the owner of the debt, by agreement between him and the Bank of Georgetown, made contemporaneously with the delivery of the check, imposed no new obligation upon the defendant. The Phenix Bank was not bound to give a written acceptance of the order. Nor could it be made liable upon the check without a written acceptance. It was bound, as it had always been, to account for the fund in its possession to the Bank of Georgetown or to its assignee, and pay it over on demand of the legal owner.

In respect to the claim that there was no delivery to the plaintiff, at the time of the alleged transfer, of any account or document showing the claim intended to be assigned, it is to be observed that the claim of the Bank of Georgetown against the Phenix Bank rested in open account on the books of the respective banks. The chose in action assigned was not a note or bond or other written obligation, the retention of which by the alleged assignor would, in most cases, be strong if not conclusive evidence that the assignment had not been completed. But an assignment of an account may be made without writing or delivery of any written statement of the claim assigned, so as to vest in the assignee a right to proceed in his own name for the recovery of the debt, provided only that the assignment is founded on a valid consideration between the parties. In *Heath v. Hall*, 4 Taunt. 327, Lord Mansfield said: "If two men agree for the sale of a debt, and one of them gives the other credit in his books for the price, that may be a very good assignment in equity; its resting in parol is no objection." In *Tibbits v. George*, 5 Ad. & El. 107, a verbal assignment of a portion of a debt was held to be good. Lord Denman said: "None of the authorities which have been cited show that it is necessary that the assignment should be in writing in order to pass an equitable interest, although in very many cases there was a writing." In *Crocker v. Whitney*, 10 Mass. 316, Jackson, J., speaking of an assignment to the plaintiff of money of the assignor in the hands of the defendant, said: "But there appears to be no reason why it may not be as well affected by a verbal request or assignment." And in *Dunn v. Snell*, 15 Mass. 481, it was held that the delivery of an execution was a good equitable assignment of a judgment, and Parker, C.J., said: "It is not doubted that this debt, upon which this judgment was rendered, might have been assigned in writing without seal or even according to the decisions without writing."

The claim that there can be no valid assignment of a part of an entire debt or obligation is opposed to the well-settled rule in this State. *Taylor v. Bates*, 5 Cow. 376; *Wheeler v. Wheeler*, 9 Cow. 34; *Pattison v. Hull*, 9 Cow. 747; *Field v. The Mayor*, 6 N. Y. 179. The point was ruled in the same way by the Court of King's Bench in *Tibbits v. George* (*supra*). The tendency of modern decisions is in the direction of more fully protecting the equitable rights of assignees of choses in action, and the objection that to allow an assignment of part of an entire claim might subject the creditor to several actions to enforce a single obligation has much less force under a system which

requires all parties in interest to be joined as parties to the action. See note to *Morton v. Naylor*, 1 Hill, 585.¹

We think the judgment should be affirmed.

All concur.

Judgment affirmed.

JACOB B. TALLMAN, RESPONDENT, v. JOHN HOEY,
APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, OCTOBER 10, 1882.

[*Reported in 89 New York Reports 537.*]

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made February 7th, 1881, which affirmed judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

This action was brought to recover a balance of the purchase-price of certain premises conveyed by plaintiff to defendant.

Defendant admitted that the balance claimed was unpaid, but set up as a counter-claim an indebtedness of plaintiff to one Lynch, a real estate broker, for commissions in effecting a sale of the premises, and an assignment of the claim to defendant. On the trial defendant gave in evidence the following instrument:

EXHIBIT I.

"J. B. TALLMAN:

"Please pay to Mr. John Hoey, or bearer, \$850, being amount of commissions due me on sale of 624 Fifth Avenue.

"M. A. J. LYNCH.

"New York, January 18, 1872."

It did not appear that defendant was indebted to Lynch at the time of the delivery of said instrument to him, or that he paid or parted with anything on receipt thereof.

Charles Edward Souther for appellant.

William Allan for respondent.

FINCH, J. The instrument which is the subject of this litigation is described by the plaintiff as a bill of exchange, and claimed by the defendant to operate as an equitable assignment of the commissions alleged to have been earned by Lynch and due from the plaintiff. If a bill of exchange, Tallman could

¹ Only so much of the opinion is given as relates to the question of assignment—ED.

not be made liable for want of acceptance in writing. If the holder can enforce it at all, it must be upon the ground of an equitable assignment. But the circumstance which justifies and induces that equitable construction which treats as an assignment what is not strictly and legally such, is the existence of a valuable consideration for the imperfect transfer. Brill v. Tuttle, 81 N. Y. 457. It proceeds upon a necessity demanded by the justice of the case, and to obviate an injury or a wrong which would otherwise occur. Where the holder has parted with nothing, and so loses nothing by the application of ordinary legal rules, no pressure of justice requires the intervention and the help of an equitable doctrine. And so it follows that, conceding the order to have been drawn on a particular fund (*Att'y-Gen'l v. Continental Life Ins. Co.*, 71 N. Y. 325 ; 27 Am. Rep. 55), yet the presence of a valuable consideration upon which the order, or direction to pay, was founded, becomes the essential and necessary element of an equitable assignment. That element is wanting in the present case. It is claimed, however, to be supplied by a legal presumption. It is undoubtedly true that where an actual assignment exists it is presumed, in the absence of proof of the facts, to have been made upon adequate consideration. *Belden v. Meeker*, 47 N. Y. 311. But here no actual assignment was ever executed. The equitable rule which transforms a mere order into an assignment is brought into play by a just necessity, existing and established, and not by a mere possibility or presumption. But in the case at bar the facts proven repel any such presumption. Not only did both Lynch and Hoey, when upon the witness stand, fail to assert any consideration passing between them for the order on Tallman, but Lynch tells us substantially the contrary. He says that if the order was not paid he expected to get his commissions of Tallman, and afterward did settle with him for them as the real owner to whom they were due. These facts indicate that the order was without actual consideration ; that it was held by Hoey merely for collection as the agent and on behalf of Lynch, or at most was an unexecuted and imperfect gift. In neither event could the doctrine of equitable assignment apply. We discover no ground upon which the counterclaim pleaded can rest, and the plaintiff's cause of action for the balance of purchase-money being conceded, a recovery for that was properly allowed.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

WALKER v. THE BRADFORD OLD BANK, LIMITED.

IN THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION,
APRIL 1, 1884.

[*Reported in Law Reports, 12 Queen's Bench Division 511.*]

THIS was a special case stated in an action brought to recover a sum of £217 8s. 3d., the amount standing to the credit of the account of Robert Vincent Reynolds at the defendants' bank at the date of his death.

The following are the material statements contained in the special case.

By an indenture of settlement dated March 1st, 1881, and made between Robert Vincent Reynolds and the plaintiff, William Walker, after reciting that Reynolds was possessed of (*inter alia*) money at his bankers the Bradford Old Bank, Limited, and being desirous of disposing of (*inter alia*) the cash at his bankers, and all moneys which might thereafter come to his hands or be paid to him from any source whatsoever for the benefit of himself and two of his daughters, Louisa Ann Reynolds and Sarah Vincent Reynolds, had determined to assign and transfer the same to the plaintiff in manner and upon the trusts, intents, and purposes thereafter declared, it was witnessed that in pursuance of such desire and intention, and in consideration of his natural love and affection for Louisa Ann Reynolds and Sarah Vincent Reynolds, he did thereby assign, transfer, and dispose of unto the plaintiff, his executors, administrators, and assigns (*inter alia*): "Fourthly, all moneys now or hereafter to be standing to the credit of the said Robert Vincent Reynolds in the books of or at the said bank at Bradford aforesaid called the 'Bradford Old Bank, Limited.' Fifthly, all moneys which from time to time may come into the hands of or be paid, or made payable to the said Robert Vincent Reynolds and all other the personal estate of the said Robert Vincent Reynolds which now or hereafter may come into the possession of, or in any way belong to or be owned and enjoyed by the said Robert Vincent Reynolds, and all the estate and interest of the said Robert Vincent Reynolds in, to, and out of the premises hereinbefore expressed to be hereby assigned, together with power to the said William Walker, his executors, administrators, and assigns, to sue and give receipts for all sums of money now due or hereafter to become due to the said Robert Vincent Reynolds in the name or names of the said

Robert Vincent Reynolds, his executors or administrators, to have and to hold the said premises hereinbefore expressed to be hereby assigned unto the said William Walker, his executors, administrators, and assigns absolutely."

It was declared by the said indenture that the plaintiff should stand possessed of the premises thereby assigned "upon trust for the said Robert Vincent Reynolds during his life, and after his death upon trust for the use of the said Louisa Ann Reynolds and Sarah Vincent Reynolds in equal shares, to be disposed of and applied for the benefit of the said Louisa Ann Reynolds and Sarah Vincent Reynolds, respectively, at such times and in such manner as the said William Walker, his executors, administrators, or assigns in his or their absolute discretion might think fit."

No notice was given to the defendants of the assignment in the lifetime of R. V. Reynolds.

R. V. Reynolds at the date of the said indenture had at the defendants' bank an ordinary private banking account to which dividend warrants, checks, and moneys were from time to time paid in the usual way, and upon which checks were drawn. After November 2d, 1882, no moneys were paid into the defendants' bank to the credit of the account.

R. V. Reynolds died on December 12th, 1882. No letters of administration to his personal estate were taken out, nor was any will proved. On February 2d, 1883, the plaintiff gave the defendants express notice of the assignment contained in the indenture of settlement, and demanded payment of all moneys then standing to the credit of R. V. Reynolds at defendants' bank.

The amount standing to the credit of R. V. Reynolds on March 1st, 1881, was £48 4s. 3d., and at the time of his death was £217 8s. 3d.

The defendants refused to pay the money to the plaintiff.

The questions submitted for the judgment of the Court were :

1. Whether the indenture was a good and valid assignment of the money in the defendants' bank standing to the credit of R. V. Reynolds either at the date of the indenture or at the date of his death, or both.

2. Whether the money in the defendants' bank standing to the credit of R. V. Reynolds as aforesaid was the property of the plaintiff by virtue of the assignment contained in the indenture, and should be paid by the defendants to the plaintiff upon his receipt alone.

3. Whether the declaration of trust contained in the indenture was a good and valid declaration of trust of the same money in

favor of Louisa Ann Reynolds and Sarah Vincent Reynolds, and whether such money should be paid to the plaintiff as trustee for them.

T. L. Wilkinson for the plaintiff.

K. E. Digby for the defendants.

The judgment of the Court (WILLIAMS and SMITH, JJ.) was read by

SMITH, J. This is an action brought by the plaintiff to recover from the defendants the sum of £217 8s. 3d., being the amount standing to the credit of Robert Vincent Reynolds in their hands at the date of his death on December 12th, 1882. The facts are set forth in the special case herein, and need not be now repeated.

Three points were raised by the bank (the defendants) in answer to the plaintiff's claim. First, they alleged that the assignment of March 1st, 1881, under which the plaintiff claimed, was a voluntary assignment, and was not one which a court of equity would under all circumstances have enforced. Secondly, that at the date of the assignment the £217 8s. 3d. was no debt or other legal chose in action within the meaning of sub-sec. 6 of § 25 of the act. Thirdly, that the notice of the assignment not having been given till after the death of the assignor, it was then too late to give it, and that it was therefore ineffectual.

As to the first point, although § 25, sub-sec. 6, of the Judicature Act, 1873, does not, in my view, give new rights, but only affords a new mode of enforcing old rights, still I am of opinion that the point now taken will not avail the defendants.

The assignment was executed on March 1st, 1881. The assignor died on December 12th, 1882. No person claiming under the assignment, and no person claiming under the assignor, and, indeed, no person having any interest whatever in the assignment, has ever taken any step to impugn it, and up to the present time it stands valid and unimpeached. I am of opinion that, this being so, it is not competent for a mere stranger to the assignment to successfully raise any point as to whether a court of equity would or would not enforce it, and I am of opinion, even if the point now taken by the defendants as to what the Court of Equity under the circumstances of this case would or would not do, be correct, that it is not open to the defendants, being mere debtors to the estate of the deceased assignor or to his assignee, now to attempt to impeach the settlement.

As to the second point, it is said that the assignment of March 1st, 1881, is not "an absolute assignment of any debt or

other legal chose in action," within the meaning of § 25, sub-sec. 6, of the act, because at the date of the assignment—

(a) The £217 8s. 3d. was not an existing debt ;

(b) No right arising out of contract then existed between the assignor and the defendants ;

(c) No legal chose in action then existed, and therefore there was nothing capable of being then assigned.

To this I answer that it seems to me that the cases of *Brice v. Bannister*¹ and of *Buck v. Robson*² decide that if an accruing debt arising out of contract be assigned, though not due at the date of assignment, such assignment satisfies the provisions of sub-sec. 6 of § 25 of the Act of 1873.

In the present case what has been assigned, to use the words of the indenture of assignment, is "All moneys now or hereafter to be standing to the credit of the said Robert Vincent Reynolds" (the assignor) "in the books of or at the said bank at Bradford, aforesaid, called the Bradford Old Bank, Limited." It was conceded in argument by the defendants that the moneys thereafter paid into the bank to the credit of the assignor were capable of being the subject-matter of contract (*Holroyd v. Marshall*³), and I am of opinion that before and at the date of the assignment, and as long as the relation of customer and banker continued between the assignor and the bank, the ordinary relation of debtor and creditor existed between them (with the superadded obligation on the bank's part to honor the assignor's checks, which is immaterial to the point under consideration), and that consequently there existed a contract on the bank's part to pay over on demand to the assignor all moneys then or thereafter standing to his credit. It seems to me, therefore, in this case, that at the date of the assignment there was an accruing debt arising out of contract, and consequently that this point also fails the defendants.

As to the third point, it is said by the defendants that by sub-sec. 6, of § 25, of the Act of 1873, the notice to be given to the debtor must be given in the lifetime of the assignor. In the first place I answer that there is no such limit of time mentioned in the section. It is not stated by whom the notice is to be given, but the effect of not giving it is to let in all equities which may exist or be created prior thereto.

It is then said that the legal right to the debt or chose in action is only passed to the assignee from the date of the notice, and that therefore the notice must be given in the lifetime of the assignor, for otherwise the legal right would upon his death

¹ 3 Q. B. D. 569, and in C. A. at p. 575.

² 3 Q. B. D. 686.

³ 10 H. L. C. 191.

vest in his personal representatives, and not pass to the assignee. I do not adopt this contention. In my view the meaning of the sub-section is, that until the assignee has given the prescribed notice, he would have to sue as he would theretofore have sued, but when the notice is given then he may bring an action at law in his own name without being incumbered with having to sue in the name of the assignor, or of having to make him a party to the action.

I am therefore of opinion that the defendants' points fail, and the plaintiff is entitled to judgment, and with costs.

My Brother Williams agrees in the result of this judgment.
Judgment for the plaintiff.

DEVON v. POWLETT.

IN THE EXCHEQUER CHAMBER, MICHAELMAS TERM, 1714.

[*Reported in 2 Viner's Abridgment 132.*]

M. DE DEVON, the plaintiff, brought an action upon the case as administratrix of Sampson de Vese de Lake v. Powlett, upon a promise made to him to pay upon his marriage to the intestate or his order, his heirs or executors, the sum of 50 guineas, and did not aver that the money was not paid to the intestate's heir. The plaintiff had judgment upon *nihil dicit*, whereupon the defendant brought a writ of error in the Exchequer Chamber, where this case was twice argued, the counsel for the plaintiff in error insisted that the declaration was bad because by the promise the money was made payable to the intestate or his order, his heirs or executors, and the plaintiff had not averred that it was not paid to his heir, to whom by the very terms of the contract it was made payable as well as to his executors. But Cowper, L.C., Parker, C.J. de B.R., and King, C.J. de C.B., resolved that the declaration was good without such averment, the thing contracted for being a mere personalty, for by the law all personalties and rights to the personalties are given to the executors or administrators, as all realties and rights to realties are given to the heir; the executors or administrators being representatives of a man, in respect of his personalties, in like manner as the heir in respect of the realties, therefore if a man enters into an obligation to pay to another or his heirs a sum of money, his executors or administrators, and not his heirs shall have it, so if one enters into a recognizance according to 23 H. 8. cap. 6, the form whereof as

set down in the statute is solvend, *eidem J. Hæredibus vel Executoribus*, his executor, and not his heir shall have the benefit of it, and judgment was after *entred termino* Mich. 1 Geo. in Scacc. *Devon v. Powlett*.

BAXTER *v.* BURFIELD.

IN THE KING'S BENCH, EASTER TERM, 1746.

[*Reported in 2 Strange 1266.*]

IN debt on bond, condition for Matthias Anderson's performance of the covenants in an indenture of apprenticeship, whereby he was bound to the plaintiff's testator, who was a mariner. The defendant pleaded that Anderson served faithfully to the death of the testator. The plaintiff replied that since the death of the testator Anderson had absented from her service, to which there was a demurrer. And after argument at bar the Chief Justice delivered the resolution of the Court—viz., that they were all of opinion the defendant should have judgment, and the executrix could maintain no such action. The binding was to the man, to learn his art, and serve him without any mention of executors. And as the words are confined, so is the nature of the contract, for it is fiduciary, and the lad is bound from a personal knowledge of the integrity and ability of the master (Hob. 134; Vaugh. 182; 3 Keb. 519 and 1 Keb. 820; 1 Sid. 216), and they denied the case in 1 Lev. 177. An award (Hil. 8 Ann. *Horne v. Blake*) that an apprentice should be assigned was held void unless there was a custom or the concurrence of the apprentice. And they held it was not material that according to Cro. Eliz. 553 the assets were liable on the master's covenant to maintain. Therefore judgment *pro def'*.

BECKHAM *v.* DRAKE, KNIGHT, AND SURGEY.

IN THE COURT OF EXCHEQUER, JULY 10, 1841.

[*Reported in 8 Meeson & Welsby 846.*]

ASSUMPSIT. The declaration stated that the defendants were united in copartnership, and used and exercised the trade and business of type-founders, stereotype-founders, and letter-press printers, and that the said W. M. Knight and J. Surgey were the ostensible partners, and W. W. Drake was a secret partner in the said copartnership; that at the time of making the memorandum of agreement thereafter mentioned, the plaintiff was in the employ of the defendants as their foreman, but with-

out any permanent engagement, and the defendants were desirous of continuing their connection together for seven years from October 20th, 1834 ; and thereupon, on October 23d, 1834, the said W. M. Knight and J. Surgey, on behalf of themselves and the said W. W. Drake, as such partners as aforesaid, made and entered into a certain memorandum of agreement with the plaintiff, as follows :

“ Memorandum of an agreement made and entered into this October 23d, 1834, A.D., between William Moxey Knight and John Surgey, of Bishop's Court, Old Bailey, in the city of London, type-founders, stereotype-founders, and letter-press printers, and copartners of the one part, and Daniel Beckham, of the same place, of the other part, as follows : Whereas the said D. Beckham hath been for some time in the employment of the said W. M. Knight and J. Surgey, as their foreman, in carrying on their said trades of type-founders, etc., and the said parties to these presents are mutually desirous of continuing their connection together for the term of seven years from the date of these presents. Now these presents witness that the said D. Beckham, for the considerations hereinafter mentioned, doth hereby covenant and agree to and with the said W. M. Knight and J. Surgey, and the survivor of them, in manner following (that is to say), that he, the said D. Beckham, shall and will well and faithfully serve the said W. M. Knight and J. Surgey, and the survivor of them for and during the term of seven years, to commence and be computed from the day of the date of these presents as their foreman, in the management and carrying on of their said trades of type-founders, etc., and shall and will, to the best of his power, promote and advance the success and prosperity of the said W. M. Knight and J. Surgey in their said trades ; and also that he, the said D. Beckham, shall not nor will, during the said term of seven years, be engaged or concerned in the same or any other trade or business, either on his own account, or on account of, or for the benefit of any other person whatsoever, other than the said W. M. Knight and J. Surgey, and the survivor of them, without the consent of the said W. M. Knight and J. Surgey, or one of them in writing, first had and obtained for that purpose ; and the said W. M. Knight and J. Surgey, for the considerations aforesaid, do hereby, for themselves and the survivor of them, covenant and agree to and with the said D. Beckham, that they, the said W. M. Knight and J. Surgey, or the survivor of them, shall and will employ the said D. Beckham as their foreman in carrying on, managing, and conducting the said trades of type-founders, etc., during the said term of seven years, if the said

W. M. Knight and J. Surgey, or either of them, shall so long live, and the said D. Beckham shall well and faithfully observe and keep the covenants and agreements hereinbefore on his part contained ; and that they, the said W. M. Knight and J. Surgey, or the survivor of them, shall and will pay to the said D. Beckham wages after the rate of £3 3s. of lawful money weekly. And it is hereby mutually agreed and declared by and between the said parties hereto, that in case either of the said parties shall not well and truly observe, and perform, and keep the covenants and agreements herein on their respective parts contained, that then and in such case the party so failing or making default shall and will pay to the other of them £500 by way or in the nature of specific damages. In witness," etc.

The declaration then averred performance of the agreement by the plaintiff during the time he remained in the service of the defendants, and that the plaintiff was ready and willing to have continued in the service of the defendants, and to have performed the agreement, but that the defendants, before the expiration of the seven years, without reasonable or sufficient cause, dismissed and discharged him from their service, etc.

The defendant Knight allowed judgment to go by default. The other two defendants severally pleaded : first, *non assumpsit* ; secondly, the bankruptcy of the plaintiff. To the latter plea the plaintiff demurred generally on the ground that the contract set out in the declaration being a contract for the personal labor of the plaintiff, his cause of action did not pass to the assignees.

The defendant's points were that the breach of contract complained of, having occurred before the bankruptcy of the plaintiff, the damages resulting therefrom formed part of the personal estate of the bankrupt at the time of his bankruptcy, and therefore passed to his assignees.

The case was argued on June 25th by

Stammers for the plaintiff.

E. V. Williams, contra.

The judgment of the Court was now delivered by

PARKE, B. This is an action on a contract whereby the defendants agreed to employ the plaintiff for seven years as foreman in a business requiring his personal skill. The contract was broken by dismissing the plaintiff altogether ; the plaintiff then became bankrupt, and the question is whether the right of action for the breach of the contract passed to his assignees.

There is a clause in the agreement that, in case either of the parties shall not observe the contract, he shall pay to the other £500 by way of liquidated damages, but there being many

stipulations on each side, of different degrees of importance, it is admitted that the case cannot be distinguished from that of *Kemble v. Farren*, 6 Bing. 141,¹ and consequently the defence is not rested on the ground, that by the breach a sum certain became due to the bankrupt, which the assignees had a right to as being in the nature of a debt. The question then is whether the right to sue for unliquidated damages for the bygone breach of such a contract passes to the assignees?

Under the 6 Geo. 4, ch. 16, § 63 "all the present and future personal estate of the bankrupt, and all debts due to him" are assigned and rendered recoverable by the assignees, and under these terms are comprised not merely personal chattels and debts, properly so called, but all rights of action for injuries to personal chattels, and for breaches of contract relative to the personal estate of the bankrupt, whereby that estate is prevented from coming to the hands of the assignees or diminished in value. In such cases, if the wrongs had not been committed, or if the contract had been performed, the bankrupt's personal estate would have been larger. *Hancock v. Caffyn*, 8 Bing. 358;² 1 M. & Scott, 521. The terms of the section include also every beneficial contract, executory or part executed, which the assignees could perform, and thereby add to the personal estate. *Gibson v. Carruthers*, *ante*, 321. This contract is not one of that description. On the other hand, the right of action for damages, for torts committed toward the bankrupt's person or reputation, clearly does not pass to the assignees, nor for trespasses *quare clausum fregit*, and to things fixed to the freehold (*Clarke v. Calvert*, 8 Taunt. 742;³ 3 Moore, 96), nor for trespasses *per quod servitium amisit* (*Howard v. Crowther*, *ante*, p. 601), nor would a right of action for the breach of all contracts pass. There are some for which an executor could not sue, as for breach of promise of marriage to a female without special damage to the personal estate (*Chamberlain v. Williamson*, 2 M. & Sel. 408), nor would it seem that he could sue for breach of contracts relating to the person of the deceased, as for negligently carrying him by a coach or vessel, or negligently conducting his cure, whereby his person was injured, or negligently conducting a suit whereby he was imprisoned. And the rights of an executor are not so limited as those of an assignee; he stands in the place of the testator by the common law, and represents him as to all his contracts and personal rights, whether they are available as assets for the payment of his debts or not, for his liability to pay debts is the consequence, not the object of his appointment; but an assignee is appointed

¹ E. C. L. R. vol. 19.² E. C. L. R. vol. 21.³ *Ibid.* 4.

by statute for the purpose of distribution among creditors, and takes only those beneficial matters (to use the language of Lord Tenterden in *Wright v. Fairfield*, 2 B. & Adol. 727¹) which may be applied. There would be no difficulty in saying, therefore, that actions for breaches of such contracts as relate to the person simply would not pass to the assignees. But suppose the result of a breach of contracts relating to the person to be a damage not to the person only, but also to the personal estate ; as, for instance, if in the case of negligent carriage or cure there were consequential damage, that the plaintiff had expended his money, or had lost the profits of a business, or the wages of labor for a time ; or suppose a joint contract to carry both the person and the goods, and both were injured, the executor probably might sue for a breach of such contract and recover damages to the extent of the injury to the personal estate ; and there is no other who could sue, but could the assignee of a bankrupt sue in any of these cases ? Could the right of action on the contract be divided into two on the bankruptcy, and the bankrupt sue for one part and the assignee for another ? It might, perhaps, where the contract itself originally related to both ; but could it where the contract relates to the person only, and the consequence of a breach of it is an injury to the personal estate as well as to the person ? No case has yet gone so far as to hold that any right of action on such a contract passes to the assignees by reason of consequential damages to the estate ; and it cannot be lost altogether, and the sounder principle seems to us to be that the bankrupt should sue upon it, as it relates to the person of the bankrupt (the damages when recovered, if recovered before the certificate, of course belonging to the assignees as after-acquired personal estate) ; and that the assignees can only sue for the breach of such contracts as in their nature relate to personal estate, or to some subject of property which does not pass to the assignees.

In that view of the case the present action would not pass, it relates to the person ; it is for the employment of the personal skill and labor of the bankrupt, and the damage for the breach of it would be compounded partly of the personal inconvenience to himself, and partly of the consequential loss to his personal estate by reason of his not being able to earn so much in another employment. We think that the plaintiff is entitled, notwithstanding his bankruptcy, to sue on such a contract as this, and that our judgment on this demurrer must be for the plaintiff.

Judgment for the plaintiff.

¹ E. C. L. R. vol. 22.

CHAMBERLAIN, ADMINISTRATOR OF ANN CHAMBERLAIN, DECEASED, v. WILLIAMSON.

IN THE KING'S BENCH, FEBRUARY 11, 1814.

[Reported in 2 Maule & Selwyn 408.]

ASSUMPSIT by the plaintiff as administrator upon a breach of promise of marriage made to the intestate, laying the promise in the usual way; and the plaintiff avers that the intestate, confiding in the said promise, etc., remained sole and unmarried until her death, and was ready, etc., and although she requested the defendant, etc., yet the defendant did not when requested, or at any time marry her, but refused, etc. And there were several other counts varying the promise, but the declaration did not allege any special damage, but concluded to the damage of the plaintiff as administrator, etc. Plea, *non assumpsit*.

At the trial before Bayley, J., at the last assizes for the county of Gloucester, the promise was proved, and it farther appeared that the intestate kept a boarding-school, which it was agreed with the defendant that she should relinquish at Christmas, 1812, in order to be married. In the preceding November, however, the defendant broke off all farther intercourse, and soon afterward the intestate's health began to decline, and she was compelled to quit her school, and died in the following May. The learned judge doubted whether the action were maintainable, but assuming for the time that it was, he directed the jury to consider of the damages as if the action had been by the intestate herself, for that whatever compensation in money she would have been entitled to by so much she would have died the richer. The jury found a verdict for the plaintiff, damages £200.

In Michaelmas term a rule *nisi* was obtained for arresting the judgment on the ground that this action was not maintainable by the personal representative, or for a new trial on the ground of a misdirection. And upon the first point the stat. 4 Ed. 3, ch. 7, *de bonis asportatis in vitâ testatoris*, and 31 Ed. 3, ch. 11, where cited, and also Com. Dig., Administration, B. 13, "that by the equity of these statutes an executor or administrator shall have every action for a wrong done to the personal estate of his testator," Latch. 168. But this, it was said, is not a wrong to the personal estate. And in *Mordant v. Thorold*¹ it was resolved that the administrator was not entitled to a *scire*

¹ 1 Salk. 252; S. C. Carth. 133.

facias upon a judgment in dower obtained by his intestate, where she died before the damages had been ascertained on a writ of inquiry, because the writ of inquiry being in the nature of a personal action for the damages, it dies with the person. And as to the misdirection, it was objected that the criterion of damages could not be the same as if the action had been by the intestate herself, by reason that she would have been entitled to damages for the loss of personal comfort, and advancement in life, and also for personal feelings, whereas the administrator could only be entitled in respect of the damage to or deterioration of her personal estate.

Peake (with *Dauncey*) now showed cause.

Jervis and *Abbott*, *contra*.

LORD ELLENBOROUGH, C.J., on this day delivered the judgment of the Court in substance as follows :

This was a motion in arrest of judgment in an action brought by the plaintiff as administrator for a breach of promise of marriage made to the intestate by the defendant. The declaration did not contain any allegation of special damage, and the question was whether the action is maintainable by the personal representative. The action is novel in its kind, and not any one instance was cited or suggested in the argument of its having been maintained, nor have we been able to discover any by our own researches and inquiries, and yet frequent occasions must have occurred for bringing such an action. This circumstance imports at least an opinion not very favorable to this species of action. However, that would not be a decisive ground of objection if on reason and principle it could strictly be maintained. The general rule of law is *actio personalis moritur cum personâ*, under which rule are included all actions for injuries merely personal. Executors and administrators are the representatives of the temporal property—that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate. But in that case the special damage ought to be stated on the record, otherwise the Court cannot intend it. If this action be maintainable, then every action founded on an implied promise to a testator, where the damage subsists in the previous personal suffering of the testator, would be also maintainable by the executor or administrator. All injuries affecting the life or health of the deceased ; all such as arise out of the unskilfulness of medical practitioners ; the imprisonment of the party brought on by the negligence of his attorney ; all these would be breaches of the implied promise by the persons employed to exhibit a proper portion of skill and attention. We are not

aware, however, of any attempt on the part of the executor or administrator to maintain an action in any such case. Where the damage done to the personal estate can be stated on the record, that involves a different question. Although marriage may be regarded as a temporal advantage to the party as far as respects personal comfort, still it cannot be considered in this case as an increase of the individual transmissible personal estate, but would operate rather as an extinction of it, though that circumstance might have been compensated by other advantages. Loss of marriage may, under circumstances, occasion a strict pecuniary loss to a woman, but it does not necessarily do so, and unless it be expressly stated on the record by allegation the Court cannot intend it. On the ground, therefore, that the present allegation imports only a personal injury, to which the administrator is not by law, nor is he in fact shown to be privy, we are of opinion that in the absence of any authorities this administrator cannot maintain this action. The cases which were cited on the other side do not appear to have such an immediate bearing on the question as to require that they should be reviewed and commented on. We are of opinion that this judgment must be arrested, and of course the motion for a new trial is thereby disposed of.

STUBBS, ADMINISTRATOR, v. THE HOLYWELL RAILWAY COMPANY.

IN THE COURT OF EXCHEQUER, JUNE 14, 1867.

[*Reported in Law Reports, 2 Exchequer, 311.*]

DECLARATION for money payable by the defendants to the plaintiff as administrator of William Stubbs, deceased, for work done by the said William Stubbs, in his lifetime for the defendants, at their request, and fees, etc., payable in respect thereof, for money paid by the said William Stubbs in his lifetime for the defendants, at their request, and for money due on accounts stated between the said William Stubbs in his lifetime and the defendants, and for money due on accounts stated between the plaintiff as administrator and the defendants.

Pleas. Never indebted, and payment. Issue thereon.

The cause was tried before Mellor, J., at the last Liverpool spring assizes, when the following facts were proved :

In December, 1865, William Stubbs, the deceased, was appointed consulting engineer by the defendants, to complete the

construction of certain works on their line. The work was to be completed in fifteen months from December 5th, and the defendants were to pay Stubbs £500 as his fee for salary for performing it, by five equal quarterly instalments. He was also to be paid his travelling expenses. The work was commenced on these terms, and the first quarterly payment of £100 was made in March, 1866. Stubbs continued in his employment for two quarters more. Soon after the end of the third quarter, and before any payment beyond the £100 had been made to him, he died intestate. Less than three fifths of the whole work had been done, but no default on the part of the deceased was proved. The plaintiff, his administrator, now sought to recover two instalments of £100 each for the second and third quarters' work, and also £10 for travelling expenses incurred by the deceased. The defendants contended, however, that they were only liable on a *quantum meruit* for the amount of work actually done during the second and third quarters. The jury found the actual value of the work done to be £150. A verdict was entered for the plaintiff for £210, being the full amount claimed—viz., £200 for the two quarterly instalments and £10 for travelling expenses. Leave was reserved to the defendants to reduce the damages to £160, on the ground that the death of Mr. Stubbs dissolved the contract, and that the contract being dissolved, the plaintiff was only entitled to recover on a *quantum meruit* for the work actually done.

A rule *nisi* having been obtained accordingly,

R. G. Williams showed cause.

Holker in support of the rule.

KELLY, C.B. I am of opinion that this rule should be discharged, and that the plaintiff is entitled to a verdict for £210. He sues as the administrator of a person named Stubbs, who had in his lifetime entered into a contract to perform certain work for the defendants in fifteen months for £500, payable under the contract in five quarterly instalments of £100 each. The deceased, it appears, performed one quarter's work, and at the close of that quarter received £100 in payment. He then performed his work during the second and third quarters, and at the expiration of the third quarter became entitled to two further instalments of £100 each. These were due to him under the contract, and a right of action for them vested in him on the morning of September 6th, 1865. Soon afterward he died, while these instalments remained unpaid. His death, no doubt, dissolved the contract, but it did not divest his representative of the right of action which had already accrued to the deceased, and which survived to that representative.

Whether circumstances existed or may be conceived to have existed, which would have enabled the defendants to maintain a cross action against Stubbs, or even against his administrator, is immaterial to the present question. Here is a perfect right of action vested in the deceased at the time of his death which survives to the plaintiff. He is, therefore, entitled to recover, there being no plea alleging that the deceased did not perform his work nor any proof of non-performance.

MARTIN, B. I am of the same opinion. The law on the subject is clear and free from doubt. Suppose a man enters into a contract to do a certain piece of work for a certain sum, then if he die before he completes it, he can recover nothing, not even if before his death he had done nine tenths of it, for the contract was for the whole work and not for nine tenths of it. But suppose that the contract is for the performance of a certain piece of work for a certain sum, to be paid at the rate, say, of £50 a month, then the person employed earns £50 at the end of each successive month. It is true that if, after doing a portion of the work he refused to do the rest, he might not be able to recover, because he could not prove that he was ready and willing to perform his part of the contract. But such a case as the present has no analogy with that of a refusal by the person employed to continue performance. The contract, no doubt, is ended by the death of Stubbs, but only in this sense that the act of God has made further performance impossible. The man's life was an implied condition of the contract, but the fact of his death can have nothing whatever to do with the payment due for what has been done, with what has been actually earned by the deceased. The contract had, it is true, an implied condition that he should live for fifteen months. But his death does not throw back his representative upon the right of recovering on a *quantum meruit* only. He can recover the stipulated price, due to the deceased when he died, of the work the deceased had actually executed. No vested right of action is taken away by death. The contract is at an end, but it is not "rescinded," for rescission is the act of two parties, not of one. With regard to the remarks quoted from Smith's Leading Cases, I may say, with the greatest respect for the learned author, that some of the positions laid down by him in the note to *Cutter v. Powell*, in his leading cases, 6th ed., vol. ii., p. 1, are not, in my opinion, fully supported by the authorities.

CHANNELL, B. I am of the same opinion. It is not denied that this contract was one of personal confidence. That being so, on the death of Stubbs it was at an end, so far as the future was concerned, but although that be so, we are not to prevent

what was done during his life, under the contract, from having its proper effect. This is not the case of a contract rescinded, but of a contract in its circumstances conditional on the life of one of the parties to it continuing for a certain period. On his death it became void. It became null for the future, but no more. The administrator might have it incumbent on him in some circumstances to show that the deceased was ready and willing during his lifetime to continue performance of the contract, or else it might be said that no right of action had vested. But in this case there is no pretence for saying that the work was not actually done by the deceased. A right of action for the price agreed upon, therefore, vested in him, and I can see nothing to prevent the bringing of this action by his representative to enforce that right.

Rule discharged.

DICKINSON v. CALAHAN'S ADMINISTRATORS.

IN THE SUPREME COURT OF PENNSYLVANIA, 1852.

[*Reported in 19 Pennsylvania State Reports 227.*]

ERROR to the Common Pleas of Lycoming County.

Two suits were brought by J. H. Woodruff and D. E. Calahan, administrators of the estate of William Calahan, deceased, against Samuel Dickinson, executor of the will of D. B. R. Dickinson, deceased; the one in covenant, and the other in *assumpsit*, for the same cause of action—viz., to recover the value of 136,678 feet of pine lumber, at \$6 per thousand, and interest thereon from April 10th, 1842.

On February 26th, 1838, William Calahan made an agreement in writing, under seal, with D. B. R. Dickinson, to sell to him all the white pine lumber that he could make at his saw-mill, near to the first fork of Pine Creek, Lycoming County, from that time till June 1st, 1843; for which Dickinson agreed to pay to Calahan \$6 per thousand feet, board measure, in cash, when taken away; the lumber to be estimated in the rafts. A further agreement was made as a part of the contract, but not reduced to writing, that Calahan should deliver, on an average, during the time above specified, at least 300,000 feet of lumber per year. An agreement was entered into on the trial that the jury should pass upon the merits of the demand and defence, without regard to the form of the action, and in case the ver-

dict and judgment be for the plaintiff in the action of covenant, then the action of *assumpsit* to be discontinued, etc.

In 1839 Calahan delivered under the contract 42,920 feet. In that year—viz., in August, 1839, Calahan sold his mill, but he obtained possession of it again in 1841, and in that year delivered about 70,000 feet under the contract. This lumber was paid for. On May 6th, 1841, Dickinson died, and on January 28th, 1842, Calahan died. On April 10th, 1842, the executor of the will of Dickinson received from the administrators, plaintiffs in the suit, 136,678 feet of boards, to apply on the contract. For the amount of this lumber, \$820.06, and interest, these suits were brought.

As a defence the defendant alleged that the plaintiffs had not complied with the contract. That in August, 1848, Calahan sold his saw-mill to Archer, thus putting it out of his power to comply; that Calahan, in his lifetime, and his administrators after his death, refused to deliver the quantity of lumber called for by the contract; that the mill was capable of cutting 400,000 feet per year, and that the price of lumber at the mill on Pine Creek during the five years would average \$9 per thousand, at which rate defendant suffered a loss of \$3 per thousand on the lumber to which it was alleged he was entitled.

Anthony, J., observed, *inter alia*, that no provision appears to have been made for Archer to supply Dickinson with lumber under the contract between Calahan and Dickinson. A question then arises with the jury, whether this sale and delivery of the saw-mill by Calahan to Archer in August, 1838, was not entirely incompatible with the contract on his part. If Calahan broke the contract during his lifetime, then his administrators would only be liable in their representative capacity on the ground of a breach of the contract by Calahan, the intestate, in his lifetime, and the responsibility of his estate for the damage sustained. But it is alleged by the counsel for the plaintiffs, that although Calahan, during his lifetime, did not deliver, on an average, 300,000 feet of boards per annum, the defendants, by accepting of 112,920 feet, waived their right to receive more, and are not entitled to recover any damages, although the jury may believe the contract was impaired by Calahan.

After a careful examination of the numerous authorities which have been cited by the counsel, the Court instruct you that under the agreement of the parties to try the cause on its merits, it will be proper for the jury to allow the plaintiffs the amount to which they are entitled for the 136,678 feet of boards, at \$6 per thousand; but if you believe William Calahan violated

the agreement in his lifetime, by selling the saw-mill some few months afterward to Archer, and by other acts which show an inability on his part to perform and comply with his agreement, and a manifest intention not to carry it into effect; and that he afterward, a short time before his death, became owner again of the saw-mill, and delivered altogether about 113,000 feet of boards to Dickinson or his agent, under the contract, you have a right to ascertain the damages which the defendant, D. B. R. Dickinson, sustained in his lifetime, on account of the said Calahan's violation of the contract, and deduct the same from the price of the boards, and if you are of the opinion that the amount exceeds the value of the boards, you may certify what sum you find for the defendant.

Various points were submitted on the part of the plaintiffs. The first point and answer were as follows:

First point. That the contract between Calahan and Dickinson is a personal, executory contract, and does not extend to the executors and administrators of the parties, and as both parties died before the time limited in the contract for the final execution or performance of the same, the administrators of Calahan are not in law compellable to perform the same, and are therefore not legally liable for the non-performance of said contract.

Answer. The Court answer, that although the contract declared on and in evidence is a personal executory contract, and both parties thereto died before the time agreed on for the final termination thereof, yet, if during the lifetime of William Calahan he violated the contract in such manner as disabled him from a compliance therewith, his administrators would be liable as representatives of his estate.

Fifth point. That the lumber delivered to the defendant in the spring of 1842 formed part of the assets of the estate of William Calahan, deceased; that the cause of action in this suit arose subsequent to the death of William Calahan, and the defendant cannot set off a debt due to him from unliquidated damages arising from covenant.

Answer. The Court answer that under the declaration filed in this cause, as well as in the action of *assumpsit*, the plaintiff claims the amount due, according to the contract, and relies for a recovery by virtue of the contract of February 26th, 1838, between William Calahan and D. B. R. Dickinson. As the claim, therefore, is in the plaintiffs' representative capacity as administrators, and the defendant was sued in his representative capacity as executor, although the lumber was delivered and received after the death of both parties, yet as the receipt

for the lumber shows on its face that it was to be applied to the contract between William Calahan and D. B. R. Dickinson, the damages, if any, which were sustained by said Dickinson, in his lifetime, by reason of a violation of the contract by William Calahan, would be an equitable defence to the amount thereof against plaintiffs' claim in this suit.

September 12th, 1849, verdict for the plaintiffs for \$1185.25.

It was assigned for error *inter alia*. 5. The Court erred in saying, "A question then arises with the jury whether this sale and delivery of the saw-mill by Calahan to Archer in August, 1838, was not entirely incompatible with a compliance with the contract." The Court should have instructed the jury on this as a matter of law.

6. There was error in charging the jury that, "If Calahan broke the contract during his lifetime, then his administrators would only be liable in their representative capacity on the ground of a breach of the contract by Calahan, the intestate, in his lifetime," etc.

7 The Court erred in their answer to the points submitted by plaintiffs' counsel.

J. Armstrong and *W. H. Armstrong* for the plaintiffs in error.
Maynard and *Willard* for the defendants in error.

The opinion of the Court, filed September 28th, was delivered by

LOWRIE, J. It seems to us very doubtful whether the oral contract could be rightly proved by the evidence that was submitted to the jury, but admit that it could. The one party, a lumber manufacturer, agreed to sell to the other, a lumber merchant, all the lumber to be sawed at his mill during five years, and that the quantity should be equal on an average to 300,000 feet in a year, without stipulating for any given quantity in any one year, and the lumber was to be paid for as delivered. Before the five years had expired both parties died, and now the representatives of the vendee seek to hold those of the vendor bound to perform the contract, and to set off damages for the breach of it against a claim for part of the lumber delivered.

It will be seen that in thus stating the question we set aside the alleged breach in the lifetime of Calahan, and we do this because the Court properly instructed the jury that under such a contract Calahan was guilty of no breach in not manufacturing the full average quantity in his lifetime, and left it to them to say whether in his lifetime he had committed any other manner of breach. The point in controversy may be stated thus: Where a lumber manufacturer contracts with a lumber

merchant to sell him a certain quantity of lumber, to be made at his mill during five years, for which he is to be paid as the lumber is delivered, and he dies before the time has elapsed, are his administrators bound to fulfil the contract for the remainder of the time?

No one can trace up this branch of the law very far without becoming entangled in a thicket from which he will have difficulty in extricating himself. Very much of the embarrassment arises from the fact that the liability of executors and administrators has been often made to depend more upon the forms of action than upon the essential relations of the parties, as will be seen by reference to the books: Platt on Covenants, 453; 2 Wms. Executors, 1060; Viner's Ab. titles "Covenants" D. E., and "Executors" H. a.; Touchstone, 178. The simplicity and symmetry of the law would certainly be greatly increased, and its justice better appreciated if in all cases where the law undertakes the administration of estates, as in cases of insolvency, bankruptcy, lunacy, and death the rules of distribution were the same.

The contract in this case established a defined relation, a relation depending for its origin and extent upon the intention of the parties. The question is, Do the administrators of a deceased party succeed to that relation after the death of the party, or was it dissolved by that event? On this question the books give us an uncertain light. In *Hyde v. Windsor*, Cro. Eliz. 552, it is said that an agreement to be performed by the person of the testator, and which his executor cannot perform, does not survive. But here the uncertainty remains, for the acts which an executor cannot perform are undefined. It recognizes the principle, however, that an executor does not fully succeed to the contract relations of his testator.

The case of *Robson v. Drummond*, 2 Barn. & Ald. 303, 22 Eng. C. L. Rep. 81, is more specific, for in that case it was held that an agreement by a coachmaker to furnish a carriage for five years and keep it in repair was personal, and could not be assigned, and executors and administrators are assigns in Law (Hob. 9; Cro. Eliz. 757; Latch, 261; Wentw. Executors, 100); that being a general term, applying to almost all owners of property or claims, whether their title be derived by act of law or of the parties. And it is no objection that one may take as executor or administrator in certain cases where the English laws of maintenance and forms of action would not allow him to take as assignee in fact, for those laws do not extend to such a case, and they have no application here.

In *Quick v. Ludborrow*, 3 Bulst. 29, it is said that executors

are bound to perform their testator's contract to build a house ; but the contrary is said in *Wentw. Executors*, 124, Vin. Ab., "Covenant," E. pl. 12, to have been declared in *Hyde v. Wind-sor*, though we do not find it in the regular reports of the case. 5 Co. 24 ; Cro. Eliz. 552. But these are both mere dicta. The same principle is repeated in *Touchstone*, 178, yet even there a lessee's agreement to repair is not so construed, and in *Latch Rep.* 261, the liability of executors on a contract to build is for a breach in the testator's lifetime. In *Cook v. Colcroft*, 2 Bl. Rep. 856, a covenant not to exercise a particular trade was held to establish a mere personal relation and not to bind executors, and the contrary is held in *Hill v. Hawes*, Vin. Ab. title "Executors," Y. pl. 4. And so executors and administrators stand on the same footing with assignees in fact with regard to apprentices, and contracts of this nature are held not to pass to either, because they constitute a mere personal relation, and are, therefore, not transferable. 2 Stra. 1266 ; 4 Ser. & R. 109 ; 1 M. 172 ; 19 Johns. 113 ; 1 Rob. 519 ; 12 M. 553, 650 ; 5 Co. 97.

The case most nearly resembling this is *Wentworth v. Cock*, 10 Ad. & El. 42, 37 Eng. C. L. R. 33, where a contract to deliver a certain quantity of slate, at stated periods, was held to bind the executors. This case was decided without deliberation, and with but little argument on the part of the executors. The plaintiff relied on the case of *Walker v. Hull*, 1 Lev. 177, where executors were held bound to supply the place of the testator in teaching an apprentice his trade. But that case had long ago been denied in England (2 Stra. 1266), and is rejected here. *Commonwealth v. King*, 4 Ser. & R. 109. This last case treats the contract as a mere personal one, that is dissolved by death, and regards as absurd the doctrine in *Wadsworth v. Gay*, 1 Keb. 820, and 1 Sid. 216, that the executors are bound to maintain the apprentice while he is discharged from duty.

But the authority principally relied on by the counsel in *Wentworth v. Cock* is the Roman law, Code Just. 8, 38, 15, and the commentary on it in 1 Pothier on Oblig. 639. Yet there are few subjects in the Roman law wherein its unlikeness to ours is more marked than in the matter of succession to personal estate, and therefore its example herein is almost sure to mislead. The difference is sufficiently indicated, when we notice that the Roman executor was in all cases either the testamentary or the legal heir, and if he accepted the estate he was considered as standing exactly in the place of the decedent, and was of course bound for all his legal liabilities, including even many sorts of offences, whether the estate was sufficient

or not. He was bound as heir and by reason of the estate given to him, and not as one appointed to settle up the estate. If the heir was unwilling to accept the estate upon these terms it became vacant, and the prætor appointed curators to administer for the benefit of all. It would seem strange that such curators should be bound to carry on the business of the deceased, where they are appointed to settle it up, yet how it really was does not appear. Dig. 427.

Our statute recognizes the duty of the executor and administrator to pay all debts owing by the deceased at the time of his death, and this is the common principle. In another clause it makes the executor and administrator liable to be sued in any action, except for libels and slanders and wrongs done to the person, which might have been maintained against the decedent if he had lived. But this furnishes us no aid in this case, and was not intended to. Its purpose is to enlarge and define the rights of action which, existing against the individual, should survive against his estate. Not contract relations and duties, but remedies for injuries already done are declared to survive. If the decedent committed no breach of contract he was liable to no action when he died, and this law cannot apply.

We are then without any well-defined rule of law directly applicable to this case, and are therefore under the necessity of deducing the rule for ourselves. The elements from which this deduction is to be made are the contract itself, the ordinary principles and experience of human conduct, the decisions in analogous cases, and the nature of the office of administrator.

We repeat the question, Does such a contract establish anything more than a personal relation between the parties? This is a mere question of construction, depending upon the intention of the parties (Hob. 9; Yelv. 9; Cro. Jac. 282; 1 Bing. 225, 8 Eng. C. L. R. 307), unless the intention be such as the law will not enforce. Is it probable that either party intended to bind his executors or administrators to such a relation? The contract does not say so, and we think it did not mean it, for it would involve the intention that the administrators of one shall be lumber merchants and those of the other sawyers. The character of the contract demands not such a construction, for each delivery under it is necessarily of complete and independent articles, and each delivery was to be at once a finished work on each side. There may be cases when it is necessary that the executor or administrator shall complete a work already begun by the decedent, and then they may recover in their representative character. 1 Crompt. & Mees. 403; 3 Mees. & W. 350; 2 Mees. & W. 190; 3 W. & Ser. 72. But here every

act of both parties was complete in itself. From the contract itself, and from the ordinary principles of human conduct, we infer that neither party intended the relation to survive.

A contrary view is incompatible in the present case with the office of administrator, for it would require him to have the possession of the saw-mill in order to fulfil the contract, and yet administrators have nothing to do with the real estate, unless the personal estate is insufficient to pay the debts, and therefore they cannot perform. It is incompatible with the general duties of administrators in that it would require them to carry on the business left by the decedent instead of promptly settling it up; it would require him to satisfy claims of this character within a year or begin to do so while the law forbids him to do so except at his own risk, and it might hang up the estate to a very protracted period. We are therefore forbidden to infer such an intention, and possibly to enforce it even if it appeared.

The inference is further forbidden by the spirit of analogous cases. It would seem absurd to say that the administrator of a physician, or author, or musician could be compelled to perform their professional engagements no matter how the contract might be expressed. The idea is ludicrous. Yet it has been supposed that an administrator might take the place of his intestate in teaching an apprentice to be a surgeon, or saddler, or shoemaker, or mariner, or husbandman, or in demanding services from an ordinary laborer, but the idea was rejected by the Court. On what ground? Most certainly not that no one else could be got to take the place of the decedent, but on the ground that no such substitution was intended by the contract, together perhaps with the feeling of the incompatibility of such a substitution with the duties imposed by law upon administrators. The law trusts people to settle up estates on account of their honesty and general business capacity, and not for any peculiar scientific or artistic skill, and the State does not hold itself bound to furnish such abilities. Some people may suppose that it requires no great skill to manufacture boards if one has the material and machinery, but still we cannot suppose that the deceased was contracting for any kind of skill in his administrators. For these reasons the Court below was right in declaring in substance that the administrators were liable only for breaches committed by the intestate in his lifetime, and the same principle applies to the death of either party. These views set aside some of the exceptions as entirely unimportant, and in the others we discover no error, and no principle that calls for any special remarks.

Judgment affirmed.

FARROW v. WILSON AND WIFE, ADMINISTRATRIX, ETC.

IN THE COURT OF COMMON PLEAS, JULY 5, 1869.

[*Reported in Law Reports 4, Common Pleas, 744.*]

DECLARATION that in consideration that the plaintiff would enter into the service of one Price Pugh and serve him in the capacity of farm bailiff at the wages of 15s. per week, together with the benefit of certain bonuses and of a certain residence in a farmhouse until the service should be determined as therein-after mentioned, Price Pugh promised the plaintiff to retain him in his service until the expiration of six months after notice given by Price Pugh or the plaintiff to the other of them to put an end to such service, or that, in case Price Pugh should put an end to such service without such notice, he should pay to the plaintiff such wages at the rate aforesaid for the six months from the time of the end of such service; that the plaintiff accordingly entered into the service of Price Pugh, and continued therein until the death of Price Pugh, and had always been ready and willing to continue in the service of his administratrix in the capacity and on the terms aforesaid, of which the defendants always had notice; yet that the defendants wrongfully dismissed the plaintiff from the said service without such notice as aforesaid, and without paying the plaintiff such six months' wages as aforesaid, whereby, etc.

Demurrer and joinder.

Bridge in support of the demurrer.

Cooper in support of the declaration.

The judgment of the Court (Willes and Montague Smith, JJ.) was delivered by

WILLES, J. In this case our judgment is for the defendants. Generally speaking, contracts bind the executor or administrator, though not named. Where, however, personal considerations are of the foundation of the contract, as in cases of principal and agent and master and servant, the death of either party puts an end to the relation; and, in respect of service after the death, the contract is dissolved, unless there be a stipulation express or implied to the contrary. It is obvious that, in this case, if the servant had died, his master could not have compelled his representatives to perform the service in his stead or pay damages, and equally by the death of the master the servant is discharged of his service, not in breach of the contract, but by implied condition.

Judgment for the defendants.

THOMAS LACY, RESPONDENT, v. SOPHRONIA A. GETMAN, AS EXECUTRIX, ETC., APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, JANUARY 14, 1890.

[*Reported in 119 New York Reports 109.*]

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made July 2d, 1888, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

The nature of the action and the facts are sufficiently stated in the opinion.

Elon R. Brown for appellant.

W. A. Nims for respondent.

FINCH, J. The relation of master and servant is no longer bounded by its original limits. It has broadened with the advance of civilization until the law recognizes its existence in new areas of social and business life, and yields in many directions to the influence and necessities of its later surroundings. When, therefore, it is said generally, as the commentators mostly agree in saying, that the contract relations of principal and agent, and of master and servant, are dissolved by the death of either party, it is very certain that the statement must be limited to cases in which the relation may be deemed purely personal, and involves neither property rights nor independent action. Beyond that a further limitation of the doctrine is asserted, which approaches very near to its utter destruction, and is claimed to be the result of modern adjudication. That limitation is that the rule applies only to the contract of the servant, and not to that of the master, and not at all, unless the service employed is that of skilled labor peculiar to the capacity and experience of the servant employed, and not the common possession of men in general; and it is proposed to adopt as a standard or test of the limitation an inquiry in each case whether the contract on the side of the master can be performed after his death by his representatives substantially, and in all its terms or requirements, or cannot be so performed without violence to some of its inherent elements.

The agitation of that question has kept the present case passing like a shuttle between the trial and the appellate courts, until it has been tried four times at the circuit and reviewed four times at General Term, and at last has been sent here in the hope of securing a final repose.

The facts are few and undisputed on this appeal. The plaintiff, Lacy, contracted orally with defendant's testator, McMahan, to work for the latter upon his farm, doing its appropriate and ordinary work for a period of one year at a compensation of \$200. Lacy entered upon the service in March, doing from day to day the work of the farm under the direction of its owner, until about the middle of July, when McMahan died. By his will he made the defendant executrix, but devised and bequeathed to his widow a life estate in the farm, and the use and control of all his personal property whatsoever in the house and on the farm, during the term of her natural life. Lacy knew in a general way the terms of the will. He testifies that he knew that it gave to the widow the use of the farm, and that she talked with him about the personal property. It is admitted that the executrix did not hire or employ him, but he continued on to the close of the year, doing the farm work under the direction of the widow until the end of his full year. He sued the executrix upon his contract with the testator, and has recovered the full amount of his year's wages. From that decision the executrix appeals, claiming that the judgment should have been limited to the proportionate amount earned at the death of McMahan, and that the death of the master dissolved the contract.

It is obvious at once that an element has come into the case as now presented, which was not there when the General Term first held that the contract survived. It now appears that the executrix could not have performed her side of the contract at all after the death of McMahan, by force of her official authority, because she had neither the possession of the farm nor personal property upon it, and no right to such possession during the life of the widow. She had no power to put her servant upon the land, or employ him about it, and in her representative character she had not the slightest interest in his service, and could derive no possible benefit from it. The plaintiff's labor, after the death of McMahan, was necessarily on the farm of the widow, by her consent, for her benefit, and under her direction and control, and equitably and justly should be a charge against her alone. The test of power to perform on the part of the personal representative of the deceased fails in the emergency presented by the facts, except possibly upon proof of the consent of the widow.

We have then the peculiar case of a contract made to work for McMahan and under his direction and control, which could not be performed because of his death, transmuted into a contract to work for Mrs. Getman upon a farm which she did not

possess and had no right to enter, and performed by working for the widow and under her direction and control alone, and this because of the supposed rule that the contract survived the death of the master and remained binding upon his personal representatives.

It is true that some interest in the personal property on the farm is claimed to have vested in the executrix, notwithstanding the terms of the will, and the inventory filed by her is appealed to, and the necessity of a resort to the personal property with which to pay debts. There is no proof that the testator owed any debts, and the inventory covers nothing as to which Lacy's labor was requisite or necessary, except possibly some corn on the ground valued at \$18. All the grain inventoried was in the barn, needing only to be threshed, and must be assumed to have been there when testator died ; and the other property consisted of farm tools and a cow and horse, to the use of which the widow was entitled and which, if sold to pay possible debts, would have left the servant without means of doing his work and with nothing to do unless for the widow. So that the bald question is presented whether the contract survived the testator's death and bound his executrix, who was without power or authority of her own to perform, and had no interest in performance.

It seems to be conceded that the death of the servant dissolves the contract. *Wolfe v. Howes*, 20 N. Y. 197 ; *Spaulding v. Rosa*, 71 N. Y. 40 ; *Devlin v. Mayor*, etc., 63 N. Y. 14 ; *Fahy v. North*, 19 Barb. 341 ; *Clark v. Gilbert*, 32 Barb. 576 ; *Seymour v. Cagger*, 13 Hun, 29 ; *Boast v. Firth*, L. R. (4 C. P.) 1. Almost all of these cases were marked by the circumstance that the services belonged to the class of skilled labor. In such instances the impossibility of a substituted service by the representative of the servant is very apparent. The master has selected the servant by reason of his personal qualifications, and ought not, when he dies, to abide the choice of another or accept a service which he does not want. While these cases possess, with a single exception, that characteristic, I do not think they depend upon it. *Fahy v. North* was a contract for farm labor, ended by the sickness of the servant, and quite uniformly the general rule stated is that the servant's agreement to render personal services is dissolved by his death. There happens a total inability to perform ; it is without the servant's fault, and so further performance is excused and the contract is apportioned. If in this case Lacy had died on that day in July, his representative could not have performed his contract. McMahan, surviving, would have been free to say that he bar-

gained for Lacy's services, and not for those of another selected and chosen by strangers, and either the contract would be broken or else dissolved. I have no doubt that it must be deemed dissolved, and that the death of the servant, bound to render personal services under a personal control, ends the contract, and irrespective of the inquiry whether those services involve skilled or common labor. For even as it respects the latter, the servant's character, habits, capacity, industry, and temper, all enter into and affect the contract which the master makes, and are material and essential where the service rendered is to be personal and subject to the daily direction and choice and control of the master. He was willing to hire Lacy for a year, but Lacy's personal representative, or a laborer tendered by him, he might not want at all and at least not for a fixed period, preventing a discharge. And so it must be conceded that the death of the servant, employed to render personal services under the master's daily direction, dissolves the contract. *Babcock v. Goodrich*, 3 How. Pr. (N. S.) 53.

But if that be so, on what principle shall the master be differently and more closely bound? And why shall not his death also dissolve the contract? There is no logic and no justice in a contrary rule. The same reasoning which relieves the servant's estate relieves also the master's, for the relation constituted is personal on both sides and contemplates no substitution. If the master selects the servant, the servant chooses the master. It is not every one to whom he will bind himself for a year, knowing that he must be obedient and render the services required. Submission to the master's will is the law of the contract which he meditates making. He knows that a promise by the servant to obey the lawful and reasonable orders of his master within the scope of his contract is implied by law, and a breach of this promise in a material matter justifies the master in discharging him. *King v. St. John, Devizes*, 9 B. & C. 896. One does not put himself in such relation for a fixed period without some choice as to whom he will serve. The master's habits, character, and temper enter into the consideration of the servant before he binds himself to the service, just as his own personal characteristics materially affect the choice of the master. The service, the choice, the contract are personal upon both sides, and more or less dependent upon the individuality of the contracting parties, and the rule applicable to one should be the rule which governs the other.

If now to such a case—that is, to the simple and normal relation of master and servant, involving daily obedience on one side and constant direction on the other—we apply the sug-

gested test of possibility of performance in substantial accord with the contract, the result is not different. It is said that if the master dies his representatives have only to pay, and any one may do that. But under the contract that is by no means all that remains to be done. They must take the place of the master in ordering and directing the work of the farm, and requiring the stipulated obedience. That may prove to effect a radical change in the situation of the servant, as it seems to have done in the present case, leading the plaintiff to the verge of refusing to work further for either widow or executrix, whose views apparently jangled. The new master cannot perform the employer's side of the contract as the deceased would have performed it, and may vary so far from incapacity or fitful temper or selfish greed, as to make the situation of the servant materially and seriously different from that which he contemplated and for which he contracted.

We are, therefore, of opinion that in the case at bar the contract of service was dissolved by the death of McMahan, and his estate was only liable for the services rendered to the date of his death.

The judgment should be reversed and a new trial granted with costs to abide the event.

All concur.

Judgment reversed.

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